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BRIEF OF DEFENDANT-IN-ERROR.

Supreme Court of the United States.

OCTOBER TERM, 1895.

NO. 38.

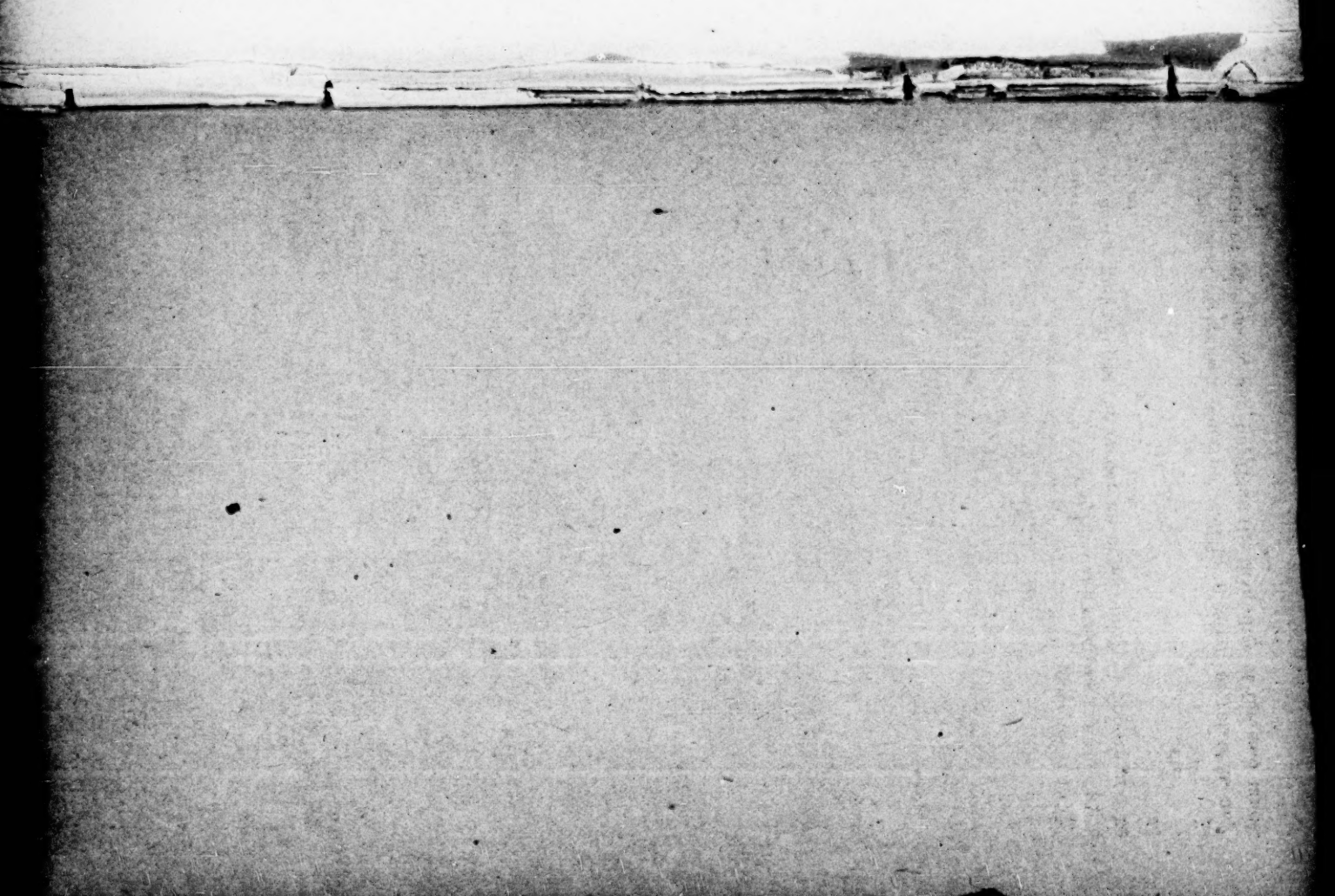
THE WINONA & ST. PETER LAND COMPANY,
Plaintiff-in error.

vs.

THE STATE OF MINNESOTA.

In Error to the Supreme Court of the State of Minnesota.

PIONEER PRESS, ST. PAUL, MINN.



14,752.

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WINONA AND ST. PETER LAND COMPANY,
Plaintiff-in-error,

vs.

THE STATE OF MINNESOTA.

BRIEF OF DEFENDANT-IN-ERROR.

The several assignments of error may, for the purposes of argument, be summarized as follows:

1. That the taxation of the lands in question is in conflict with section 10 of article 2 of the constitution of the United States in this, that it impairs the obligation of the contract existing between the Winona & St. Peter Railway Company in respect to the taxation of the lands of that company before the same are sold and conveyed.

2. That the Minnesota statute under which the taxation of the said lands was sought is in conflict with the fifth amendment to the constitution of the United States, in that it authorizes taxation without notice and affords the owner no opportunity to appear and be heard.

I.

The first assignment does not call in question or relate to any statute of Minnesota, but questions the taxability of the said lands.

The contention of the plaintiff-in-error is that the lands were at the time they were placed upon the tax-lists by the county auditor exempt from taxation by reason of the granting act of the territory of Minnesota, approved May 22, 1857. The provision of that grant at all material here is section 4 thereof, which is as follows:

"The said lands so granted shall be and are exempted from all taxation until the same shall have been sold and conveyed by said company. In consideration of the grant of land and other franchises and privileges hereby confirmed in and conferred on the Transit Railroad Company, the said company shall pay into the treasury of the territory or State of Minnesota three per cent upon all the gross earnings of said road, the amount of the gross earnings to be ascertained by the verified statement of the president and treasurer of said company, as hereinbefore provided for; and the said three per cent shall be so paid into the treasury of the territory or future State of Minnesota within sixty days after any portion of the said road shall be operated, and annually thereafter; and the same, when paid, shall be in lieu of all taxes whatever."

The same assignment was raised when this case was before the supreme court of Minnesota, but was not urged or discussed. It received, however, as will directly be seen, the consideration of the court.

The taxability of the said lands has been conclusively determined by the supreme court of Minnesota.

Under date of Oct. 31, 1867, said railroad company entered into a contract with one Danford M. Barney and others, which contract is commonly known as the "Barney Contract," and which appears *in extenso* on pages 28 to 36 of the Paper Book.

The question was presented to the supreme court of Minnesota in the case of *State* vs. *Winona & St. Peter Land Co.*, 21 Minn. 472, whether the Barney contract was such a sale and conveyance of the lands therein named as to subject them to taxation within the meaning of the language employed in section 4 of the act of 1857. The court therein reached the affirmative view, and among other things say:

"The object of the act was to secure construction of the road with the lands granted by congress for that purpose. The commutation for public burdens imposed upon property was one of the inducements held out to the company to undertake the enterprise. Were the property of the company to be taxed according to its as-

sessed value, while the road earned but little, and the lands were unsalable, it might be a very serious burden, the prospect of which might have prevented parties undertaking the construction and operating of the road; and so the tax is to be imposed not according to the assessed value of the company's property, but according to its ability to pay, that is according to the amount of its earnings. It was contemplated that the road would be constructed, and perhaps for a time maintained from the proceeds of the lands granted and also that it might be a considerable time before those proceeds could be realized by sales; and if, while unable to realize by sales, the lands were to be subject to taxes, the actual proceeds would be thereby diminished, and the ability of the company to construct and maintain its road, from such proceeds, proportionately impaired. To avoid this was manifestly the purpose of the exemption, and the exemption is to be extended only so far as is necessary to effect that purpose. It cannot be claimed that the company can sell or give to any other person the benefit of the exemption. Now when the company has sold the lands and realized the proceeds and retains no lien upon, nor actual interest in the lands, even though it retains the naked legal title only as trustee for the purchaser, it is a matter of indifference to its interests, and to its ability to operate the road, that the lands are taxed. If taxes are assessed, it need not pay them. If the lands are sold for the taxes, it loses nothing. In the case before us, if the exemption still continues, it continues not for the benefit in any way of the company, but solely and exclusively for the benefit of Barney and associates. If the exemption is preserved by the company retaining the naked legal title, as trustees for the purchasers, then it may, in effect, sell or transfer to another what was intended for its exclusive benefit and not for the benefit of its purchasers. No such result could ever have been intended in the act of 1857. We therefore conclude that the lands were sold and conveyed within the meaning of section 4 of that act by the contract with Barney and his associates, and that they are subject to taxation."

State vs. *Winona & St. Peter R. Co.*, 21 Minn. 478, 479.

The court cites in support of its decision the following cases:

Carroll vs. *Safford*, 3 How. 441.

Witherspool vs. *Duncan*, 4 Wal. 210.

The same question was again presented to the same court in 1888 in the case of *County of Brown* vs. *Winona & St. Peter Land Company*, 38 Minn. 397.

In the last-named case the defendant company sought to draw a distinction between that case and *State* vs. *Winona & St. Peter*

Rd. Co., supra, growing out of a controversy between the grantees in the Barney contract and their grantors as to the quantity of lands to which the former were entitled. Barney and his associates having brought suit against the railroad company in the circuit court of the United States to determine the question in dispute, and the final decree therein not having been entered until March, 1887, it was contended in *County of Brown* vs. *Winona & St. Peter Land Co., supra,* on behalf of the defendant, that there was no "sale and conveyance until the entry of the said decree." The question was, however, disposed of in the following language:

"The conclusion which the defendant insists upon, to-wit: That there was no sale and conveyance of the lands by the company, within the meaning of the exempting clause of the act granting the lands as it has been construed by this court, till the entry of the decree in the circuit court, does not follow. That decree created no rights; it only declared the rights created by the contract and existing prior to the commencement of the suit, and enforced them by compelling a conveyance of the legal title. The equitable title to the lands designated in the decree passed to the purchasers under the contract as soon as the title to them vested in the railroad company. The decree could not otherwise have been made. The existence of any misunderstanding between the parties as to the effect and extent of the contract and as to the specific lands covered by it, or as to the rights of the purchasers under it, did not affect the rights created by it. Nor did the bringing of the suit have any such effect. The only effect of the decree was to dispose of any misunderstanding as to what rights the purchasers had under the contract, to declare to what lands they were entitled, and to direct a conveyance of the legal title. The lands were, therefore, subject to taxation, as were those covered by the decision of this court referred to."

Again, the same question arose in *County of Brown* vs. *Winona & St. Peter Land Co.*, 39 Minn. 380, and the same determination was reached as in the prior cases.

Finally, in the case at bar, the same court declared the taxability of the said lands no longer an open question.

It cannot be successfully contended that the effect of the Barney contract was not to vest Barney and his associates with the complete ownership of the lands therein refered to.

The supreme court of Minnesota in construing section 4 of the act of 1857, hereinbefore quoted, has defined the limitation of the terms "sold and conveyed" as therein employed, and say:

"We therefore conclude that the lands were sold and conveyed within the meaning of section 4 of that act by the contract with Barney and his associates, and that they are subject to taxation."

State vs. *Winona & St. Peter R. R. Co., supra.*

But the contention of the plaintiff-in-error is untenable for another and an insuperable reason.

The respondent makes no claim that the lands while yet owned by the company were not exempt from taxation. Conceding, for the purpose of argument, that the lands were not taxable, but that the taxing officer, in a mistaken view as to his duty or authority, placed them upon the tax lists, and that his action was sustained by the courts of Minnesota, no case is then presented of the impairment of the obligation of a contract within the prohibition of the federal constitution. The act would not be distinguishable in principle from that of the taxation in any year, while the lands were yet the property of the company, of any piece or parcel of them. It would have been an act of injustice to the company and a judgment of the court sustaining it would have served to emphasize that injustice. But this court would have been powerless to redress it. As was said in *Knox* vs. *Exchange Bank*, 12 Wall. 379:

"We are not authorized by the judiciary act to review the judgments of the state courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, when the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held."

And, furthermore, as was said in *New Orleans Waterworks* vs. *Louisiana Sugar Co.*, 125 U. S. 18:

"In order to come within the provision of the constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals.

"This court, therefore, has no jurisdiction to review a judgment of the highest court of a state, on the ground that the obligation of a contract has been impaired, unless some legislative act of the state has been upheld by the judgment sought to be reviewed. The general rule as applied to this class of cases, has been clearly stated in two opinions of this court, delivered by Mr. Justice Miller. 'It must be the constitution or some law of the state which impairs the obligation of the contract, or which is otherwise in conflict with the constitution of the United States and the decision of the state court must sustain the law or constitution of the state, in the matter in which the conflict is supposed to exist; or the case for this court does not arise.'"

This doctrine was affirmed in *St. Paul, Minneapolis & Manitoba Ry. Co.* vs. *Todd County*, 142 U. S. 282. Nor do we understand that what was said in *Mobile & Ohio Rd.* vs. *Tennessee*, 153 U. S. 486, militates against it in any respect. There the charter of the railroad company exempted its property from taxation for the period of twenty-five years. The supreme court of Tennessee adjudged the exemption clause to be void and no obstacle to the taxation of company's property. This court asserted its jurisdiction to determine whether a contract did, in fact, exist and whether a subsequent law impaired that contract. It was there said, quoting from *Jefferson Bank* vs. *Skilly*, 1 Black, 436, 443:

"Its (the supreme court) rule of interpretation has invariably been that the constructions given by the courts of the states to state legislation and to state constitutions have been conclusive upon this court *with a single exception*, and that is, when it has been called upon to interpret the contracts of states, 'though they had been made in the forms of law,' or by the instrumentality of a state's authorized functionaries, in conformity with state legislation. It has never been denied, nor is it now, that the supreme court of the United States has an appellate power to revise the judgment of a supreme court of a state whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant to be one within the meaning of that clause of the constitution of the United States which inhibits the states from passing laws impairing the obligation of contracts. Of what use would the appellate power be to a litigant who feels himself aggrieved by some particular state legislation if this court could not decide, independently of all adjudication by the supreme court of a state, whether or not the phraseology of an instrument in controversy was expressive of a contract and within the protection of the constitu-

tion of the United States, and that its obligation should be enforced notwithstanding a contrary conclusion by a supreme court of a state?"

If the supreme court of Minnesota had, in construing the charter of the company, held the exemption clause therein for any reason void, or if a law had been passed subsequent to the granting of the charter, repealing, in effect, such exemption clause, and the supreme court of that state had sustained the repealing law, a case would have been presented clearly falling within the purview of the provision of the constitution now invoked by the plaintiff-in-error.

The defendant-in-error therefore respectfully submits that this court is without jurisdiction to review the judgment of the supreme court of Minnesota and that the writ of error should be dismissed, unless jurisdiction is acquired perforce of one or the other of the remaining assignments.

II.

The assignment based upon the fifth amendment (second assignment, page 15, of transcript of record) is not avaliable upon this appeal.

In *Barron* vs. *The Mayor and City Council of Baltimore*, 7 Peters, page 247, the court say:

"The plaintiff in error contends that it comes within that clause in the fifth amendment to the constitution which inhibits the taking of private property for public use without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a state as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

"The question thus presented is, we think, of great importance, but not of much difficulty.

"The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be

exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

"If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government—not as applicable to the states. In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no farther than they are supposed to have a common interest."

The same doctrine is announced in the following cases:

Withers vs. *Buckley*, 20 How. 84;

Davidson vs. *New Orleans*, 96 U. S. 97;

Kelly vs. *Pittsburg*, 104 U. S. 78.

In *Kelly* vs. *Pittsburg*, *supra*, it was said:

"As regards the effect of the fifth amendment of the constitution, it has always been held to be a restriction upon the powers of the federal government, and to have no reference to the exercise of such powers by the state governments. * * * We need, therefore, give the first assignment no further consideration."

III.

Without waiving the objection that there is no proper assignment whereby the statute of Minnesota can now be questioned, we shall assume, but merely for the purposes of the argument, that the plaintiff-in-error has rested its appeal in part upon the fourteenth amendment of the federal constitution.

The county auditor, in placing the lands upon the tax lists, acted pursuant to an act of the legislature of Minnesota, enacted in 1881, which is as follows:

"If any real or personal property shall be omitted in the assessment of any year or years, and the property shall thereby escape taxation, when such omission shall be discovered the county auditor shall enter such property on the assessment and tax books for the year or years omitted, and he shall assess the same and extend all arrearages of taxes properly accruing against such property with seven per cent interest thereon from the time said taxes would have

become delinquent and the same shall be extended against such property on the tax lists for the current year." (G. L. 1881, c. 5, sec. 1).

The above statute is designed to secure the taxation of omitted property and to authorize the county auditor to place it upon the tax lists and to assess it at its proper valuation.

As construed by the supreme court of Minnesota it is ineffectual, as already suggested, to authorize the exaction of either interest or penalties.

The several objections urged against the statute by the plaintiff-in-error may be summed up in this, that it authorizes the county auditor to arbitrarily assess property without adequate opportunity afforded the owner to secure redress for any existing grievance.

The best and the controlling evidence as to the real intent of the statute is, of course, afforded by the construction placed upon it by the highest court of the state. As thus construed we are able to say of it:

1. It does not authorize an assessment upon the value of to-day, but of the year or years when the lands should have been assessed.

2. It does not authorize an arbitrary assessment.

3. It does not preclude a hearing and correction of an erroneous assessment but makes ample provision for both.

If these propositions are sustained, and that they may be, we hope to abundantly demonstrate, then are the contentions of the plaintiff-in-error futile.

1. In support of the *first* proposition, attention is called to the following language of the supreme court of Minnesota taken from its decision when this case was before it:

"It is true that the act in question merely appoints the county auditor the assessor and makes it his duty to assess the property, without specifically providing on what basis he shall fix its valuation or what means he shall adopt to ascertain it; but it is not to be assumed for the purpose of invalidating the statute that it contemplated or authorized the assessment upon an unconstitutional basis, as, for example, the value of the property to-day. *On the contrary, it must be understood as provid[illegible] for an assessment upon the only basis that could be lawfully adopted, to-wit, the value of the property at the time the land should have been assessed.* And while the law does not specifically provide what means the auditor shall take to ascertain that fact, yet as it is made his duty to ascertain it, it is also impliedly his duty to adopt such means of doing so as are reasonably within his reach, and from these to exercise his best judgment."

County of Redwood vs. *W. & St. Peter Land Co.*, 40 Minn. 520.

2 and 3. In support of the *second* and *third* propositions we quote the following from the same decision:

"The difficulty in the way of arriving at an exactly accurate result on account of the lapse of time is no fatal objection to the statute. Uniformity as near as may be is all that the statute requires. Moreover, if the auditor, either from mistake or negligence, makes an unfair or unequal assessment, *the owner has an opportunity of being heard and having this corrected in the proceedings instituted to obtain judgment against the land*, and this fact is also an answer to the suggestion so frequently made by appellant, that the assessment is made arbitrarily by the auditor, without notice or opportunity to be heard on the part of the owner." Id.

Surely, in the face of so clear an exposition of the terms of the statute, argument is quite unnecessary.

In order to fully appreciate the force of the decision of the Minnesota court, as above expressed, the provisions of the statute of that state bearing upon the question should be considered. We therefore insert them here.

1. *List of delinquent taxes to be filed by county auditor on or before June 15th. Filing same has the effect of filing complaint in an action and is notice of pendency thereof.*

"On or before the fifteenth day of June, the county auditor shall file in the office of the clerk of the district court of the county, or if it be attached for judicial purposes to some other county, then in the office of the clerk of such court in that county, a list of the delinquent taxes upon real estate within his county, which list shall contain a description of each piece or parcel of land on which such taxes shall be so delinquent, with the name of the owner if known, and if unknown, so stated, appearing on the delinquent list, and the total amount of tax delinquent and penalty for each year opposite such description, and shall verify such list by his affidavit that the same is a correct list of taxes delinquent, for the year or years therein appearing, upon real estate in said county. The filing of such list shall have the force and effect of filing a complaint in an action by the county against each piece or parcel of land therein described, to enforce payment of the taxes and penalties therein appearing against it, and shall be deemed the institution of such action; and the same shall operate as notice of the pendency of such action." (Gen. Stat. 1878, c. 11, s. 70.)

2. *The clerk within fifteen days to deliver copy to auditor together with notice to owners to file objections.*

"The clerk shall, within fifteen days thereafter, make and deliver to the county auditor a copy of the list so filed, and attach thereto a notice which may be substantially in the following form:

State of Minnesota, County of ..... ss
District Court, ... Judicial District.

The State of Minnesota, to all persons, companies or corporations who have or claim any estate, right, title or interest in, or claim to or lien upon, any of the several pieces or parcels of land in the list hereto attached, described:

The list of taxes and penalties on real estate for the county, remaining delinquent on the first day of June, has been filed in the office of the clerk of the district court of the county of ....., of which that hereto attached is a copy. Therefore you, and each of you, are hereby required to file in the office of said clerk, within twenty days after the last publication of this notice, your answer, in writing, setting forth any objection or defense you may have to the taxes and penalties, or any part thereof, upon any piece or parcel of land described in said list, in, to, or on which you have or claim any estate, right, title, interest, claim or lien.

And in default thereof, judgment will be entered against such piece or parcel of land for the taxes on said list appearing against it, and for all penalties, interest and cost.

(Signed) .....,

Clerk of the District Court in said County of .....

(Here insert list.)" (Id., sec. 71.)

3. *County auditor to publish notice.*

"The county auditor shall cause said notice and list to be published once in each of two consecutive weeks, in some newspaper of general circulation, printed in the English language, and which has been regularly published for at least three months previously, in the county in which said real estate is situate, if there be one, or in the county where the proceedings are instituted, or if there be no such newspaper published in either county, then in some newspaper published within the judicial district, the first publication of which list shall be made within ten days after the delivery thereof to the auditor as provided in the preceding section. The newspaper in which such publication shall be made shall be designated by resolution of the board of county commissioners of the county in which the taxes are levied, at their annual meeting in January or at the meeting of said board in March, a copy of which resolution, certified by the county auditor, shall be filed in the office of the clerk of the court; *provided*, that if the county commissioners shall fail to designate such paper, then it shall be designated by the county auditor." (Id., sec. 72.)

4. *Notice deemed served when last publication made and jurisdiction of court then acquired. Jurisdiction not affected by irregularities occurring prior to filing the delinquent list.*

"When the last publication shall have been made, the notice shall be deemed to have been served and the court to have acquired full and complete jurisdiction to enforce against each piece or parcel of land in said published list described the taxes, accrued penalties and costs upon it then delinquent so as to bind every estate, right, title, interest, claim or lien in law or equity, in, to or on such piece or parcel of land, of every person, company or corporation. And such jurisdiction shall not be in any way affected by any error in making the list filed with the clerk, nor by any error, irregularity or omission in the assessment or levy of the taxes, or in any other proceedings prior to filing the said list, nor by any mistake in copying the list for publication, nor by any mistake in publishing such list, nor by any mistake in the amount of tax in such published list appearing against any piece or parcel of land therein described." (Id., sec. 73.)

5. *Publishers to file affidavit of publication.*

"The owner, publisher, manager or foreman in the printing office of the newspaper in which such notice and list shall be published shall make and file with the clerk an affidavit of such publication, stating the days in which such publication was made, and shall also file with the clerk three copies of each number of the paper and supplement, if any, in which the notice and list shall have appeared. The publication may be made in such newspaper, or partly in such newspaper and partly in a supplement issued therewith." (Id., sec. 74.)

6. *Person having any interest in delinquent tract may file answer within twenty days after last publication, setting forth his defense.*

"Any person, company or corporation, having any estate, right, title, or interest in, or lien upon any piece or parcel of land embraced in said list as published, may, within twenty days after the last publication of said notice, file in the office of the said clerk an answer, verified as pleadings in civil actions, setting forth his defense or objection to the tax or penalty against such piece or parcel of land, which answer need not be in any particular form, but shall clearly refer to the piece or parcel of land intended, and set forth, in ordinary and concise language, the facts constituting the defense or objection to such tax or penalty; and if the list shall embrace the taxes for two or more years, the defense or objections may be to the taxes or penalty for one or more of such years." (Id., sec. 75.)

7. *If answers are filed, they shall stand for trial at general or special term of court — Manner of trials.*

"If answers shall be filed within the time hereinbefore prescribed as to the taxes or penalties upon any pieces or parcels of land embraced in said list as published, such answers shall stand for trial at any general term of the district court in the county where such proceedings are pending, in session at the time when the time to file answers as aforesaid shall expire, or at the next general or special term appointed to be held in said county; and if no general or special term shall be appointed to be held within thirty days thereafter, then the same shall be brought to trial at any general term appointed to be held within the judicial district, upon ten days' notice. It shall be the duty of the county attorney of the county in which said taxes are levied, if there be one, and, if there be none, then of the county in which such proceedings are instituted, to take charge of and prosecute such proceedings; but the county commissioners of the county in which such taxes are levied may employ any other attorney to assist such county attorney therein. At the term at which such proceedings come on for trial, they shall take precedence of all other business before the court. The court shall proceed without delay, and summarily hear and determine the objections or defenses made by the several answers, and shall dispose of all such answers, and direct judgment accordingly at the same term, and in the trial thereof shall disregard all technicalities and matters of form not affecting the substantial merits." (Id., sec. 77.)

8. *Judgment to be rendered if law has been complied with. Certain omissions of officers not a defense. Court may reduce tax. Always defense that taxes have been paid, or that property is not subject to taxation.*

"If all the provisions of law in relation to the assessment and levy of taxes shall have been complied with, of which the list so filed with the clerk shall be *prima facie* evidence, then judgment shall be rendered for such taxes, and the penalties and costs. *But no omission of any of the things by law provided in relation to such assessments and levy, or of anything required by any officer or officers to be done prior to the filing of the list with the clerk, shall be a defense or objection to the taxes appearing upon any piece or parcel of land, unless it be also made to appear to the court that such omission has resulted to the prejudice of the party objecting, and that the taxes against such piece or parcel of land have been partially, unfairly or unequally assessed; and in such case, but no other, the court may reduce the amount of taxes upon such piece or parcel, and give judgment accordingly. It shall always be a defense in such proceedings, when made to appear by answer and proofs, that the taxes have been paid, or that the property is not subject to taxation.*" (Id., sec. 79.)

The most cursory examination of the foregoing provisions in the statutes of this state is sufficient to indicate how completely the owner of property is armed with the power of resisting the payment

of an unjust tax, even in the case of omitted property. It is there clearly provided that relief shall be afforded whenever it is made to appear to the court that through the omissions of the taxing officers the owner of property has been prejudiced or the taxes against his property *"have been partially, unfairly or unequally assessed."* In such case it is expressly provided that "the court *may reduce the amount of taxes* upon such piece or parcel and give judgment accordingly." (See section 79, *supra.*)

A somewhat recent decision of the supreme court of Minnesota construing section 79, *supra,* sheds important light upon the meaning of that section:

"It may safely be concluded that under this law, recognizing the right to defend in respect to taxes 'partially, unfairly or unequally assessed,' it was contemplated that a property owner might show in defense or in reduction of the tax charged upon its property that the requirement of a *bona fide* assessment had been intentionally disregarded by the taxing officers to the prejudice of such land-owner. We go further, and hold, as was considered in respect to special assessments under a city charter in *State* vs. *Board of Public Works of St. Paul,* 27 Minn. 442, and *State* vs. *District Court of Ramsey County,* 29 Minn. 62, that, even though no intentional fraud be proved, it may be shown in defense that the error in the assessment was so gross that it cannot be accounted for upon any ground of mere misjudgment of value, but must have resulted, if not from fraud, from what in the case first cited above was called a 'demonstrable mistake of fact.' By proof of this nature it would be possible to show very clearly that there had really been no assessment of the property in question, and that the valuation on the assessment roll did not express any estimate or opinion of the assessor as to the value of the property."

County of Otter Tail vs. *Batchelder,* 47 Minn. 516.

And again, in the case now before this court, the Minnesota court said in reply to the contention of the learned counsel in respect to the said section:

"Without following counsel through their exhaustive arguments * * * it is sufficient to say that it seems to proceed upon what we consider two false assumptions: * * * *Second, that* under the tax law (Gen. St. 1878, c. 11, secs. 75, 79) *the defenses* which he may interpose by answer, when the state applies for judgment, *are so restricted as not to include all the objections which go to the merits of the proceedings.* Where, as in the present case, the tax is levied on

property, not specifically, but according to its value to be ascertained by some person appointed for that purpose, undoubtedly a party is entitled to notice and an opportunity to be heard; but we know of no case where it was ever held that a party was entitled to notice of, and to be heard in, each step in tax proceedings as it is taken. We doubt whether any tax law ever provided for any such thing. The principle running through all the cases is that a law does not infringe upon the constitutional provision under consideration if the property-owner has an opportunity to question the validity or amount of the tax *either before that amount is determined, or in subsequent proceedings for its enforcement.* Whenever by law a tax is imposed upon property, and those laws provide for a mode of confirming or contesting it in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law. *Davidson* vs. *New Orleans*, 96 U. S. 97; *Hagar* vs. *Reclamation District*, 111 U. S. 701.

"This right is fully given under the sections of the law already referred to. Within twenty days after the last publication of the delinquent list any person may by answer interpose any defense or objection he may have to the tax. He may set up as a defense that the tax is void for want of authority to levy it, or that it was partially, unfairly or unequally assessed. *Commissioners of St. Louis Co.* vs. *Nettleton*, 22 Minn. 356. He may set up as a defense *pro tanto* that a part of the tax has not been remitted, as required by some statutes. *Commrs. of Houston Co.* vs. *Jessup*, Id. 552. That the land is exempt, or that the tax has been paid. *County of Chisago* vs. *St. Paul & Duluth R. Co.*, 27 Minn. 109. That there was no authority to levy the tax, or that the special facts authorizing the insertion of taxes for past years in the list did not exist, or any omissions in the proceedings prior to filing the list, resulting to his prejudice. *County of Olmsted* vs. *Barber*, 31 Minn. 256. The filing of the list is the institution of an action against each tract of land described in it, for the recovery of the taxes appearing in the list against such tract, and tenders an issued on every fact necessary to the validity of such taxes. *Chauncey* vs. *Wass*, 35 Minn. 1. The only limitation or restriction upon the defenses or objections which may be interposed is that contained in section 79, to the effect that if a party interposes as a defense an omission of any of the things provided by law in relation to the assessment or levy of a tax, or of anything required by any officer to be done prior to filing the list with the clerk, the burden is on him to show that such omission has resulted in prejudice to him, and that the taxes have been partially, unfairly or unequally assessed."

County of Redwood vs. *W. & St. P. Land Co.*, *supra*, 518.

It is therefore seen that the law of 1881, as construed by the supreme court of Minnesota in connection with other provisions of the tax laws of that state, does not deprive the owner of omitted property of any substantial right. There remains to him the adequate right of a day in court. With this assurance, there is no question for the consideration of this court within the rule adopted and followed by it in the numerous decisions hereinbefore cited.

The views urged by the defendant-in-error in this regard find support in several of the decisions of this court from which the following expressions are quoted:

"Whenever, by the laws of this state or by state authority a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be of the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person of such proceeding in regard to the property as is appropriate to the nature of the case, judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

Davidson vs. *New Orleans*, 96 U. S. 104.

"It is not possible to hold that a party has without due process of law been deprived of his property when as regards the issues affecting it he has by the law of the state a fair trial in a court of justice according to the mode of proceeding applicable to such a case." (Id.)

"By due process of law is meant one which following the forms of law is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by law. It must be adapted to the end to be attained, and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought."

Hagar vs. *Reclamation Dist.* 111 U. S. 708.

"Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings which imply that the party to be affected shall have notice and an opportunity to be heard; so also where title or possession of property is involved, *but where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal*, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable." (Id.)

"It has, however, been repeatedly decided by this court that the proceedings to raise the public revenue by levying and collecting taxes are not necessarily judicial, and that due process of law as applied to that subject does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals. Notice by statute is generally the only notice given and that has been held sufficient."

Kentucky R. R. Cases, 115 U. S. 331.

"In its application to proceedings for the levy and collection of taxes it was said in *McMillen* vs. *Anderson*, 95 U. S. 37, 42, that 'it is not and never has been considered necessary to the validity of a tax that the party charged should have been present or have an opportunity to be present in some tribunal where he was assessed.' This language, it is true, was used in the decision of a case in reference to a license tax, where all the circumstances of its assessment were declared by statute, and nothing was intrusted to the discretion of public officers; but in the State Railroad Cases, 92 U. S. 575, where the ascertainment of the taxable value of railroads was the duty of a board, as in the present cases, whose assessment was challenged for the reason that the proceeding was not 'due process of law' for want of notice and a hearing, it was said by Mr. Justice Miller, delivering the opinion of the court: 'This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and in the business of assessing taxes, this is all that can be reasonably asked.'"

Kentucky R. R. Cases, supra.

"The notice need not be a personal citation; it is sufficient if it be given by a law designating the time and place where parties may contest the justice of the valuation. As a general rule only a statutory notice is given. The state may designate the kind of notice and the manner in which it shall be given. All that we assert or have asserted is, that there must be a notice of some kind which will call the attention of parties to the subject and inform them *when and where they will be permitted to expose any alleged wrong in the valuation of which they may complain.*"

County of Santa Clara vs. *Southern R. Co.*, 18 Fed. Rep. 410.

"The remedy for abuse is in the state courts, for, in the language of Mr. Justice Field in *Mobile* vs. *Kimball*, 'this court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal and oppressive state legislation.'"

Walston vs. *Nevin*, 128 U. S. 578.

"The purpose of the constitutional provision in question is to exclude everything which is arbitrary and capricious in legislation affecting the rights of the citizen. They are aimed against purely personal arbitrary power."

Dent vs. *W. Virginia*, 129 U. S. 124.
Wick Wo vs. *Hopkins*, 118 U. S. 356.

IV.

It is competent for the legislature to provide for the taxation of omitted property.

It was urged by the plaintiff-in-error before the supreme court of Minnesota, and it is assumed that the same contention will be urged upon this appeal, that taxes cannot be raised upon omitted property, for the reason that the expenses of government have been met and that therefore no proper use therefor exists. It was also urged that such taxation is "extortion and confiscation;" and that the act of 1881 is not a remedial statute.

The courts would seem to have adopted the opposite view.

In *Fairfield* vs. *The People*, 94 Ill. 244, the court say:

"It is by our constitution a cardinal principle of taxation that all shall contribute to raising revenue for governmental purposes in proportion to the value of their property. It was the duty of these objectors to have thus contributed to the municipal expenses of the city in the years 1873 and 1874.

"The enforcement of this duty was entered upon by the attempted levy and collection of taxes for those years on their property, and failed only from an irregularity in the mode of procedure. What if the expenses of those years have been paid and satisfied? It was from the taxation of others, and not from any contribution made by the objectors. Their taxes remaining uncollected, the result would be that they would escape the payment of their just proportion toward the maintenance of municipal government, while others would bear more than their proportion of it. In avoidance of such injustice, and in assertion of the constitutional principle of equality of taxation, was the enactment of 1877. The act merely provides that what might and should then, in the former years, have been done, may now be done. The taxes were at the time, in 1873 and 1874, authorized in the respect of having the basis of a corporate purpose to sustain them. Because the taxes are not now needed for, and will not be applied to, the particular corporate purpose for which they were required at the time they were attempted to be levied and collected, the municipal expenses of 1873 and 1874, it does not follow that

when collected they will not be applied to some municipal purpose. They would belong to the corporation, and would, like any other surplus, remain in the treasury subject to future appropriations for municipal purposes, and thereby lighten future taxation and thus operate in the equalization of the burden of taxation. In *Village of Hyde Park* vs. *Ingalls, et al.*, 87 Ill. 11, where there was an item of some $22,000 in the tax levy of the village to pay expense of collection and deficiencies in collection, this court, in answer to an objection to this item, said: 'A surplus may undoubtedly be brought into the treasury by this mode of levying, but it will not be lost. It will belong to the corporation, and may be used in extinguishing other debts or in the payment of current expenses, and thereby lighten future taxation.' "

In *Tallman* vs. *City of Janesville*, 17 Wis. 73, the court say:

"Cannot the legislature pass such laws as it may from time to time find necessary to cure defects in existing laws for raising revenue, whenever they are discovered, and make the assessment of taxes as nearly equal as possible? This is all the legislature really attempted to do by passing this law for the purpose of curing the invalidity in the previous tax proceedings. The former discrimination under the charter, it was contended, produced a gross inequality in the imposition of taxes, and violated the rule of uniformity prescribed by the constitution; and when this view was sustained by this court, the necessity for a readjustment and relevying of taxes for the previous years became apparent. There does not seem to be anything very extraordinary or unusual in such legislation; indeed we should think the taxing power was defective if it could not be exercised to cure such errors. The taxes for the four previous years having been declared void, the financial embarrassments of the city must have been insuperable, unless the legislature could grant some relief. The remedy afforded was permission for a reassessment of the taxes in order to make all property contribute equally to the support of the government. Those citizens who had paid their taxes were credited with that payment upon the reassessment of their property, and delinquent taxpayers had no just ground of complaint because they were made to contribute their proper proportion to the public burdens.

"The law is, however, severely denounced because it provides for levying a tax upon lands for the years 1854, 1855, 1856 and 1857, which had been purchased by the respondents of the former delinquent tax owners for a full and valuable price paid since, and which, when purchased, were not subject to any lien or charge. To impose the taxes now for those years, it is claimed, is productive of great injustice and oppression. There is doubtless some force in this objection, and yet, because the law operates harshly in some cases, we

cannot declare it void if it is a proper exercise of the taxing power. Almost every system of taxation operates more or less unequally and works injustice in individual cases. The objection here taken would lie with equal force against the provision of the revised statutes which authorizes the assessor, upon discovering that any land liable to taxation in his town was omitted in the assessment roll of either or both the two previous years, to assess the same for those years it was omitted, in order that the taxes, to the amount which should have been paid in the years of such omission, may be imposed and collected. Sec. 25, ch. 15, R. S. 1849; sec. 27, ch. 18, R. S. 1858. Under these provisions it is very apparent a tax might be levied and collected upon lands which had by purchase become the property of persons other than those who owned them when the tax should have been paid. Undoubtedly, analogous provisions will be found in many other revenue laws of our sister states, which inevitably operate oppressively in individual cases. And still this power of correcting defective assessment rolls, on the part of the public authorities, is a salutary and highly beneficial feature of our systems of taxation. It is not to be abandoned because in some instances it produces individual hardships. Every taxpayer is interested in having the property list as perfect as possible, and therefore power to correct omissions and inequalities in the rolls is intrusted to some of the taxing officers. Again, the respondents must be assumed to have known when they purchased these lands that the taxes formerly assessed against them had been declared void, and they purchased with full knowledge of the power of the legislature to provide for a reassessment of them. True, they might not have known that the legislature would exercise this power, but they took this risk. And whatever laws the legislature might pass, within the limitations of the constitution, to correct the previous defective proceedings in assessing taxes, they must submit to."

In *Cross* vs. *City of Milwaukee*, 19 Wis. 344, the court reaffirms the doctrine announced in *Tallman* vs. *City of Janesville*, *supra*, and further say:

"The legislature of this state has plenary power over the subject of taxation so long as it does not violate the principle of uniformity, and may, we think, prescribe the mode of correcting an informal assessment. It was so decided in the Tallman case, and we are satisfied with the rule there laid down upon this subject. Indeed, as we there said, this power of correcting defective assessment rolls is a highly beneficial feature of our system of taxation, and we should think the taxing powers of the government very defective if it could not be extended to cure such errors."

In New York the court not only sustains the authority of the legislature to provide for a reassessment of property, but goes to the

extent of holding, that, in the case of a void assessment, the legislature itself may make the assessment. Thus, in matter of *Van Antwerp*, 56 N. Y. 261, the court say:

"It is also objected that it is not competent for the legislature to validate a void assessment, and that it could only authorize a reassessment. The answer to this is that the legislature did not attempt to legalize the old assessments, but itself exercised the power of making new assessments. The old assessments are referred to, not for the purpose of adoption but for the purpose of fixing the specific amount by the proportion specified; and the act expressly levies that amount *as a tax*. It is as certain as if the particular sum was specified. The legislature, in effect, has declared that the petitioner shall pay a specified sum upon his property described, toward defraying the expenses of repaving St. Felix street, adjacent to which his property is located; and it has imposed a like burden upon property similarly situated. It was conceded, on the argument, that the legislature might have authorized a reassessment. If so, it is clear that it could make the reassessment itself; and this is precisely what it did by the act of 1872. Whatever the legislature may authorize to be done by a municipal corporation, it may do itself directly; and it is no objection that the improvement had been made and expenses incurred. (37 N. Y. 267.)

"The act in question does not interfere with any vested right or cause of action of the petitioner to set aside the original assessment."

Spencer vs. *Merchant*, 100 N. Y. 586.

In *Overing* vs. *Foote*, 43 N. Y. 290, property had been taxed to the wrong person in 1864, and it was thereupon placed upon the tax list in 1865 for the omitted year. It certainly is a question of no importance, so far as the principle is concerned, whether the omission occurred one or several years before the discovery thereof. If the legislature may provide for corrections of such omissions in the one case, it may also in the other.

In *People* vs. *Board of Assessors*, 92 N. Y. 439, we have a case on all fours with that of *Overing* vs. *Foote*. There the omission occurred in 1880 and was corrected in 1881, under the same statute involved in the Overing case. The statute merely provided that it should be the duty of the assessors, "upon the application of any three tax-payers in said town, city or ward, who shall consider themselves aggrieved, to enter said land or property in the assessment roll of the current year, at the valuation of the year in which said tax was omitted, or, *if not then valued* at the valuation of the preceding

year, in a separate line from the valuation of the current year." No provision whatever was made for notice or hearing, and in this respect it was not unlike the statute of Minnesota in question. It was objected in that case that the act was for that reason invalid. The court held, however, that the statute "must be read and construed in connection with the general system of which it forms a part." The court further held, in line with the decision of the Minnesota court in the case at bar, that it cannot be said "that the act of 1865 requires that the property of the relator be taken without notice or an opportunity to be heard."

Nor is this principle affected by what is said in *Overing* vs. *Foote*, 65 N. Y. 263. It was there held that the assessment was void because it had not been made within the time prescribed by law. And the judge who wrote the opinion of the court says:

"I find nothing in the act of 1865 which requires any special notice to be given of the reassessment of omitted taxes for the previous year, or any special provision for the hearing of any party aggrieved. The act says that, 'whenever it shall appear to the assessors' that an omission mentioned in the act has been made, they may assess the omitted property for the then current year, but I cannot suppose it was intended that this might be done without some form of notice, and as none is provided for in the act, some reference was intended to be had to the general laws relating to that subject. It was obviously contemplated that the petition in such cases must be presented when the assessors had power to put the names of tax-payers upon the roll for the current year, and not after they had lost all power to amend the assessment roll by adding names or property of any kind whatever. I therefore conclude that this attempted assessment was void."

A statute has long existed in the state of Illinois providing for the assessment of omitted property, which is substantially like that of Minnesota upon the same subject. So identical is it with the latter statute that its reproduction here will serve to demonstrate that Minnesota has not at least in this respect, adopted anomalous legislation:

"If any real or personal property shall be omitted in the assessment of any year or number of years or the tax thereon, for which such property was liable, from any cause has not been paid, or if any such property, by reason of defective description or assessment thereof, shall fail to pay taxes for any year or years, in either case the

same, when discovered, shall be listed and assessed by the assessor and placed on the assessment and tax books. The arrearages of tax which might have been assessed, with ten per cent interest thereon, from the time the same ought to have been paid, shall be charged against such property by the county clerk. It shall be the duty of county clerks to add uncollected personal property tax to the tax of any subsequent year, whenever they may find the person owing such uncollected tax assessed for any subsequent year." Rev. Stat. Ill., chap. 120, sec. 276.

It will be seen that all the criticisms so strenuously urged by the learned counsel for the plaintiff-in-error against the statute of Minnesota apply with equal force to that of Illinois.

It is significant that the validity of the statute of Illinois has never been questioned, although frequent cases must have arisen under it since its enactment many years ago, and it has on several occasions been brought to the attention of the highest court of that state.

In *Allwood* vs. *Cowen*, 111 Ill. 481, the plaintiff sought to enjoin the collection of a tax, but no question was raised as to the validity of the statute under which the assessment was made. It was also brought to the attention of the court in the following cases:

Neff vs. *Smyth*, 111 Ill. 100.

O. & M. Ry. Co. vs. *People*, 123 Ill. 648.

A similar statute is in existence in Tennessee (Acts of Tenn. 1879, chap. 79), and was not questioned in *Shelby County* vs. *Rd. Co.*, 16 Lea, 401.

The foregoing authorities would seem to completely negative the contention of the plaintiff-in-error that taxes cannot be raised upon omitted property because amounting to "extortion and confiscation."

V.

The presumption is that the county auditor adopted and pursued appropriate means in assessing the lands.

While the law does not specifically provide what means the auditor shall take to ascertain that fact (the valuation), yet, as it is made his duty to ascertain it, it is impliedly his duty to adopt such means of doing so as are reasonably within his reach, and from them to exercise his best judgment.

County of Redwood vs. *W. & St. Peter Land Co.*, 40 M. 520.

Transcript of Record, p. 7, folio 14.

The authorities are unanimous to the effect that taxes shall be presumed legally assessed until the contrary is affirmatively shown.

Hunt vs. *Chapin*, 42 Mich. 25.

Buck vs. *People*, 78 Ill. 560.

New Orleans vs. *Banking Co.*, 99 U. S. 97.

The assessment of the property on the assessment rolls and the methods of valuation are presumed correct until the contrary is proved, and the burden is on the petitioner, in proceedings to vacate an assessment, to establish the irregularity or illegality.

VI.

Not only is the presumption as above expressed, but the fact is, as determined by the findings of the District Court of Minnesota, that the county auditor properly performed his duty.

The certificate of the district court (transcript of record, pages 16 to 20) contains the following:

"Fourth. That said lands described in said answer having been omitted in the assessment of taxes for all prior years and having thereby escaped taxation for all years prior to 1886, the county auditor of said county properly entered the same on the assessment and tax books and properly assessed the same and extended all arrearages of taxes which had accrued against the same, and that the tax and penalty named in said delinquent list against each piece and parcel of land described in the defendant's answer except those tracts mentioned in the fourth paragraph thereof has been impartially, fairly, and equally assesesd by said auditor for each of the years named in said list."

It is, therefore, respectfully submitted that the judgment of the supreme court of Minnesota should be affirmed.

Respectfully sumbitted,

H. W. CHILDS,
Attorney General of Minnesota,
and GEORGE B. EDGERTON,
Attorneys for Defendant-in-Error.

Supreme Court of the United States.

October Term 1895

~~No. 99.~~

THE WINONA & ST. PETER LAND COMPANY

Plaintiff in Error.

vs.

THE STATE OF MINNESOTA.

Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

Brief in Behalf of Brown County. By John Lind.

Of Counsel for Defendant in Error.

(14,054)

SUPREME COURT.

UNITED STATES.

OCTOBER TERM, 1894.

THE WINONA & ST. PETER LAND COMPANY,

Plaintiff in Error,

VS.

THE STATE OF MINNESOTA,

Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

Brief Submitted by John Lind, for Brown County, and of Counsel for the Defendant in Error.

The attention of the Court is respectfully called to the fact that while the plaintiff in error has seen fit to submit this case upon the brief and argument made in the case of The

Winona & St. Peter Land Company, plaintiff in Error, vs. The State of Minnesota, involving the taxation of lands in Redwood County, the facts and record in this case, arising upon the taxation of lands in Brown County, are materially different.

Upon the record certified to the Court in this case, it is contended that the writ of Error should be dismissed for the reason that it does not appear from the record, nor was it claimed in the State Courts, that any law of the State of Minnesota, and invoked by it in enforcing the claim of the State for taxes, is in conflict with the Constitution of the United States. On the contrary, the answer made by the plaintiff in Error in the District Court of Brown County, in which Court and County the tax proceedings originated and were pending, alleges, (page 22, record) "that said lands above described were acquired by the Winona & St. Pete. Railroad Company, a corporation created and organized under the laws of the late territory and present State of Minnesota with authority to construct that line of railroad known as the "Winona & St. Peter road", and were so acquired by said railroad company to aid in the construction of said line of Railroad under the act of Congress entitled, " An act making a a grant of lands to the Territory of Minnesota in alternate sections to aid in the construction of certain railroads in said territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of a certain

railroad in said State," approved March 3, 1857, and acts amendatory thereof, and certain acts of the late Territory and present State of Minnesota passed in the execution of a trust created by said act of Congress. That said lands were so acquired by said Railroad Company prior to the years for which taxes are now claimed against the same respectively. That under the laws of said State, relating to the property of said railroad company, said lands were exempt from taxation during the time the same should be held and owned by said railroad company; and the answer alleges that said railroad company continued to hold the legal title to said lands and claimed the same as its own until some time in the year 1887, when said lands were conveyed by said railroad company to this defendant, the said Winona and St. Peter Land Company, and the answer therefore claims that said lands were not nor was any tract thereof subject to taxation while so held and claimed by said railroad company."

The sole and only question raised in, or discussed by the Supreme Court of Minnesota in this case was, whether a certain agreement for the sale of lands constituted a conveyance of the lands, and the Court following its earlier decisions on the same question held that it did. This does not present a federal question for review in this Court – as is stated by this Court in

The Miss. & Mo. R. R. Co. vs. Rock,
4 Wall. 177,

"It must be the constitution, or some law of the State, which impairs the obligation of the Contract, or which is otherwise in conflict with the constitution of the United States; and the decision of the State court must sustain the law or Constitution of the State in the matter in which the conflict is supposed to exist, or a case for this Court does not arise."

Lawler vs. Walker, 14 How 149.

Even if the decision of the Supreme Court of the state of Minnesota in constructing the provisions of the contract commented on were erroneous, such error would not present a federal question. The rule governing such cases is stated by Justice Miller in Knox vs. The Exchange Bank of Virginia, 12 Wall. 379, as follows, "But we are not authorized by the Judiciary Act to review the judgments of the State courts, because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, when the party setting up a contract alleged that the Court had taken a different view of its obligations to that which he held. As this Court said in Railroad Co. v. Rock, 4 Wall. 181, it must be the Constitution, or statute of the State which impairs the obligation of a contract, or the case does not come within our jurisdiction. See, also, Railroad Co. v. Mc. Clure, 10 Wall 511." And it may well be asked in this case as was asked by the Court in that case, What statute or Constitutional provision of the State of Min-

nesota is supposed to affect unfavorably the contract disposing of these lands?

A Federal question cannot be raised for the first time in a petition for a writ of Error or in the Writ of Error or in the Assignment of Errors, as is sought to be done in this case. The cases cited are conclusive on that point, and repetition of authorities deemed unnecessary.

It is respectfully submitted that the answer of Plaintiffs in Error made in the District Court of Brown County in these tax proceedings and found on page 22 of the record does not nor does the decision of the District Judge, commencing on page 8 of the record, nor the decision of the Supreme Court of the State, brought here on Writ of Error, suggest or pass upon any federal question, and the Writ of Error should therefore be dismissed.

2. If this Court should hold that this case is properly here for review, and that this contract by which the railroad company had conveyed these lands is before it for construction de novo, then it is suggested that as to these lands, the entire argument of Counsel commencing on page 17 of the plaintiff's brief under the heading, "No Lands Described," is to no purpose, as the answer filed by the Plaintiff in Error in the District Court of Brown County admits in Folio 42 on page 22, "that said lands were so acquired by said Railroad Company prior to the years for which taxes are now claimed against the same, respectively," and consequently, they were specifi-

cally and certainly covered by the contract, and the title to them had passed, as was held both by the Circuit Court of the United States decreeing the specific performance of the contract for the conveyance of the land, and by the Supreme Court of the State of Minnesota in the decision cited in the opinion in this case.

3. It is further submitted that the plaintiff in Error have utterly failed to show that these lands, even if owned by the Winona & St. Peter Railroad Company, were not subject to taxation. Liability to taxation is the rule and immunity from taxation is the exception, as is well stated by Judge Webber in deciding this case, on page 13 of the record. What charter, statute, or constitutional provision is set out in the record upon which such exemption can be predicated? Will this Court take the bare statement of Counsel for its guide in matters of as grave importance to this Community and to the State as the denial of the power of taxation?

4. As to the suggestion that the law, under which the taxes involved in this proceeding were enforced, is unconstitutional, it is sufficient answer, that this question was not raised in the State Courts. The only objection made to the taxes in the State Courts is found in the answer, in paragraph 2, on page 23 of record, and this objection was sustained by the Supreme Court ot the State. The validity of the Statute on the ground of its being repugnant to the Constitution of the United States "was not drawn in question" and cannot

be raised here for the first by the brief of Counsel

R. R. Co. vs. Rock, 4 Wall. 177.

In the case now before this Court, with the same title as this, but concerning lands in Redwood County, the question of the Constitutionality of the Statute under which these taxes were levied was raised and passed upon by the Supreme Court of Minnesota, and the statute held valid, see County of Redwood vs. Winona & St. Peter Land Co., 40 Minn. 512. This decision settles the constitutionality of the law under the State Constition

R. R. Co. vs. Backus, 154 U. S., 421.

The unlimited opportunity afforded the land owner under the statute to contest the tax and to have errors or inequalities in it corrected as is shown by the record in this case is sufficient evidence that it does not contravene any rights guaranteed the citizen by the constitution of the United States.

John Lind,
for Brown County,
and of Counsel
for Deft. in Error.

159 U.S. 541

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~284~~ 44

CHARLES A. WEEKS, PLAINTIFF IN ERROR,

vs.

COLEMAN BRIDGMAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED AUGUST 31, 1891.

(14,830.)

(14,830.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 284.

CHARLES A. WEEKS, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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1 CHARLES A. WEEKS, Plaintiff in Error,
vs.
COLEMAN BRIDGMAN, Defendant in Error.

The United States of America to Coleman Bridgman, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on or before the (30th) thirtieth day of August, 1891, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein Charles A. Weeks is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, one of the justices of the Supreme Court of the United States, this 1st day of August, in the year of our Lord one thousand eight hundred and ninety-one.

JAMES GILFILLAN,
Chief Justice Supreme Court, Minnesota.

2 STATE OF MINNESOTA, }
County of Stearns, } *ss:*

John A. Roeser, being first duly sworn, on his oath says that between the hours of six o'clock in the morning and nine o'clock in the evening on the 8th day of August, 1891, at the city of St. Cloud, Stearns county, Minnesota, he served the within citation upon Oscar Taylor, the attorney for the defendant in error in the within-entitled cause, at the residence of said Oscar Taylor, by then and there handing to and leaving with Kate Berger, a person of suitable age and discretion, a true copy of said citation, the office and usual place of business of said Oscar Taylor not being open so as to admit of service therein and the said Oscar Taylor being then and there absent from the city of St. Cloud, where resides this affiant.

JOHN A. ROESER.

Subscribed and sworn to before me this 8th day of August, 1891.

[SEAL.] GEO. H. REYNOLDS,
Notary Public, Stearns Co., Minn.

3 [Endorsed:] 6894. Supreme Court of the United States. Charles A. Weeks, plaintiff in error, *vs.* Coleman Bridgman, defendant in error. Citation. Due service of the within instrument is admitted this 8th day of August, 1891. —— ——, attorney for def't in error. Due service of the within instrument is admitted this 8th day of August, 1891. C. Bridgman, def't in error. Filed August 12, 1891. C. P. Holcomb, clerk.

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Minnesota, being possessed of the record and proceedings herein, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you or some of you, being the highest court of law or equity in said State in which a decision could be had in said suit between Charles A. Weeks, plaintiff, and Coleman Bridgman, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, and wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under said clause of the Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff, Charles A. Weeks, as by his complaint appears, *he*, being willing that error, if any hath been, should be duly cor-

5 rected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on or before the 30th day of August, A. D. 1891, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, the fourth day of August, in the year of our Lord one thousand eight hundred and ninety-one.

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

OSCAR B. HILLIS,
Clerk U. S. Cir. Ct, Dist. of Minnesota.

Allowed by—
JAMES GILFILLAN,
Chief Justice Supreme Court of the State of Minnesota.

6 [Endorsed:] 6894. Supreme Court of the United States. Charles A. Weeks, plaintiff in error, *vs.* Coleman Bridgman, defendant in error. Writ of error. Copy. Filed Aug. 6, 1891. C. P. Holcomb, clerk.

7 To the Honorable James Gilfillan, chief justice of the supreme court of the State of Minnesota:

Charles A. Weeks complains that in the records and proceedings and also in the rendition of a judgment in a certain proceeding in which the said Chas. A. Weeks was plaintiff and Coleman Bridgman was defendant, in the supreme court of the State of Minnesota, it being the highest court of law or equity in said State in which a decision could be had in said action and proceeding and in which a final judgment or order was entered against the said Chas. A. Weeks on the 30th day of June, A. D. 1891, in said proceeding, affirming the judgment of the district court of said State of Minnesota in and for the county of Stearns, in and by which it was adjudged and determined that the defendant, Coleman Bridgman, was and is the owner in fee-simple of the parcel of land the title to which was in controversy in said action, to wit: Lots numbered ten (10), eleven (11), and twelve (12) of block number forty (40), in the town of St. Cloud City, according to the plan and survey thereof made by T. A. Curtis and on file and of record in the office of the register of deeds in and for said Stearns county; and also adjudging that the said plaintiff, Chas. A. Weeks, has no title, right, interest, claim, or demand in or to said real estate, and that said Coleman Bridgman have his costs and disbursements incurred in said action.

And your petitioner claims that the said judgment of said district court of Stearns county and the order and judgment of said supreme court affirming said judgment of such district court
8 and the law in pursuance of which said action has been maintained and said judgment rendered are in conflict with and repugnant to the provisions of an act of the Congress of the United States entitled "An act making a grant of land to the Territory of Minnesota in alternate sections to aid in the construction of certain railroads in said Territory and granting public lands in alternate sections to the State of Alabama to aid in the construction of certain railroads in said State," approved March 3rd, 1857, and of an act of the Legislative Assembly of the Territory of Minnesota entitled "An act to execute the trust created by the act of Congress entitled 'An act making a grant of land to the Territory of Minnesota in alternate sections to aid in the construction of certain railroads in said Territory and granting public lands in alternate sections to the said State of Alabama to aid in the construction of certain railroads, and granting certain lands to railroad companies therein named,'" approved May 22nd, 1857, and also of an act of the legislature of the State of Minnesota entitled "An act to facilitate the construction of the Minnesota and Pacific railroad and to amend and continue the act of incorporation relating thereto," approved March 10th, 1862, in the following, among other, particulars:

First.

The Minnesota and Pacific Railroad Company was duly organized under and pursuant to an act of the Legislative Assembly of the

Territory aforesaid approved May 22, 1857. The St. Paul and Pacific Railroad Company was duly organized under said act approved March 10, 1862, and under and by virtue of said act became the owner of all the lines of railroad formerly owned by the Minnesota and Pacific Railroad Company extending from St. Cloud to Watab, in the State of Minnesota, and also of the lands granted to the Territory, now State, of Minnesota to aid in the construction of said line of railroad by said act of Congress approved March 3rd, 1857.

Second.

On the 6th day of February, 1864, the first division of the St. Paul and Pacific railroad was organized for railroad purposes, which organization was afterwards confirmed by the legislature of the State of Minnesota by an act approved February 6th, 1866, and said First Division Company succeeded to all the rights, privileges, and lands possessed or granted to the said Minnesota and Pacific Railroad Company or the said St. Paul and Pacific Railroad Company or in any way appertaining to said branch line.

Third.

After the passage of said act of Congress of March 3, 1857, and prior to December 30, 1857, the Territory of Minnesota duly caused to be definitely located the line of said branch railroad from St. Anthony northward to St. Cloud and along and opposite the parcel of land described in said judgment, and on said 30th day of December, 1857, a map of the definite location of said railroad was filed with the Secretary of the Interior of the United States.

That said lands described in said judgment are in section thirteen, township one hundred and twenty-four, range twenty-eight, according to the Government survey thereof, and said section is within six miles of said branch line as it is and was definitely located.

Fourth.

Under and by virtue of said act of Congress of March 3, 1857, all of said section thirteen was by the Secretary of the Interior on the 25th day of October, 1864, certified to the State of Minnesota, and thereafter, in September, 1866, said branch line was constructed and completed to St. Cloud opposite to said section thirteen, and your petitioner, Charles A. Weeks, plaintiff as aforesaid, acquired previous to the commencement of this action all the right and title to the lots of land described in said judgment that was ever possessed by said State or Territory or said railroad companies or either of them, and has never parted with the title to said land or any part thereof.

Fifth.

At the time of the definite location of said line of railroad and the filing of the map of such location with the Secretary of the Interior of the United States said section thirteen formed a part of

the public lands of the United States, and no part of the same had ever been reserved, sold, or granted, and no other right attached thereto except such right as one George F. Brott may have acquired by a pretended settlement and claim thereon growing out of his right, if any, as mail contractor with the Government, hereinafter referred to.

Sixth.

On the 9th day of September, 1855, said George F. Brott entered into a contract with the Government of the United States to carry the United States mail from Minneapolis to St. Cloud, in then Territory, now State, of Minnesota, from the 1st day of December, 1855, to the 30th day of June, 1858, under the provisions of section four of an act of Congress approved in 1825, and pursuant to such contract Brott carried the mail under said contract and during the time named therein.

11 On the 7th day of August, 1857, Brott made application to the United States land office at St. Cloud aforesaid to file therein as mail contractor on the southwest quarter of the northwest quarter of said section thirteen, with other lands, which embraced land in suit and described in said judgment, claiming the right to pre-empt the same as mail contractor aforesaid under an act of Congress of March 3, 1855, entitled "An act making appropriations for the service of the Post Office Department during the fiscal year ending the 30th day of June, 1856." Such application was rejected by the local land office and from the decision rejecting it Brott appealed to the Commissioner of the General Land Office, by whom the decision was affirmed. From such decision of affirmance Brott appealed to the Secretary of the Interior aforesaid, who by his decision and order in effect directed that said Brott be allowed to enter said land, and that the State and said railroad company be required to relinquish their claim to it. This order of relinquishment was revoked by the Secretary of the Interior on the 5th day of June, 1871. Brott made no further effort to enter this land simply as such mail contractor, but he thereafter entered the same under and in pursuance of an act of Congress passed for his relief, paying for said land the price and sum specified in said act of Congress as above referred to, which act is entitled "An act for the relief of George F. Brott," and was approved on the 26th day of May, 1860. In July, 1871, a patent for said land issued from the United States to him in the usual form, except that it cited that said land had been certified to the State of Minnesota for railroad purposes by mistake.

Seventh.

12 As such mail contractor said Brott in 1855 established his mail station upon said section thirteen, which station consisted of one stable and building for the use of his team and carriage, and he maintained the same during the term of his contract.

He was not a contractor engaged in carrying mails through

any of the Territories west of the Mississippi, in the Territory or State of Minnesota, except from St. Anthony to St. Cloud, as heretofore stated, and the route on which he carried the mail did not form a part of a system or any part of a route extending across an Territory west of the Mississippi river, but the same terminated at St. Cloud; and no mail was carried west from St. Cloud under the United States Government until the latter part of the year 1856 or some time in the year 1857.

Eighth.

The defendant, Coleman Bridgman, at the time of the commencement of this action, was seized of all the right and title to the lots in controversy that said Brott ever had or possessed under his said patent, and the defendant claims his right to such title under and by virtue of mesne conveyances from said Brott and through his grantees, which were duly recorded.

Ninth.

The plaintiff was seized of all the right and title to the premises in controversy that the said First division of the St. Paul and Pacific Railroad Company ever had or possessed therein, and he acquired such right and title under and by virtue of mesne conveyances duly made, executed, and delivered by and through said railroad company and its grantors.

The said premises are vacant and unoccupied.

13 Tenth.

Your petitioner further says that the title to said parcel of land from the General Government to the said State of Minnesota, from said State to said First Division Company, and from said company by mesne conveyance to your petitioner, who, at the time of the commencement of this action, had title to said land in fee, was derived from, through, and under said act of Congress of March 3, 1857, and said act of May, 1857, under which said Minnesota and Pacific Railroad Company was organized.

That said Brott did not acquire any right, title, or interest in said land as such mail contractor for the reason that said Brott was not a contractor or engaged in carrying the mails through any of the Territories west of the Mississippi river, and that the route upon which he contracted to carry the mail from Minneapolis or St. Anthony to St. Cloud did not form any part of a system or route extending across any Territory west of the Mississippi river, and no mail was carried west from St. Cloud until nearly two years after his contract with the Government was executed.

That no right of pre-emption had attached to said land before or when the route of said road was definitely fixed and located, and the same had not been segregated at that time from the public domain by any act or claim of said Brott; that said Brott never entered said land in the local land office; that he only made application to enter, which application was rejected, and when the Sec-

retary of the Interior ordered in effect that said Brott be allowed to enter said Brott made no effort to enter by filing any further application to that end or by proceeding with the application he had made and which had been rejected; that he afterwards under the act of May 26th, 1860, applied for the land and paid for it, and all the right and title which he acquired was under a patent
14 from the Government based upon such claim and under said act of 1860. He acquired no right from the Government and was entitled to acquire none as such mail contractor or by virtue of any application or entry made as such.

Eleventh.

Your petitioner further says that there was drawn in question in said action and proceeding the question as to whether said First Division Company or the State of Minnesota, its grantor, acquired an interest and title in said land under said act of Congress of March 3, 1857, or whether before the definite location of its line of railway a right of pre-emption had attached, and whether the land had become segregated by virtue of the proceeding on the part of said Brott claiming a right to acquire the same under his mail contract and by virtue of the application made by him for such entry in the local land office at St. Cloud; and there was also drawn in question the right and title of your petitioner as successor to said First Division Company to the land in suit and described in said judgment, and the decision of said district court affirmed by the decision and judgment of said supreme court of the State of Minnesota was adverse to and against the right, title, and privilege so claimed and set up by your petitioner.

Your petitioner therefore prays the allowance of a writ of error, returnable to the Supreme Court of the United States, to review such decision and judgment; and your petitioner will ever pray.

CHAS. A. WEEKS.
M. D. GROVER, *Att'y.*

I allow the writ of error prayed for in this petition, and direct it to be issued.

JAMES GILFILLAN,
Chief Justice Supreme Court, State of Minn.

15 *Assignments of Error.*

First. The conclusion of law is contrary to the findings of fact.

Second. No entry was made by George F. Brott of the land in question. His application to enter was rejected by the local land office and was never recognized, allowed, or made a matter of entry and record in the local office. No right attached to the land in favor of said George F. Brott by virtue of his application to enter or proceedings in the local land office. He did not upon the decision of the Secretary of the Interior take any further proceedings to make or perfect an entry. The land was not segregated from the

public domain by reason of any action or proceeding on the part of said George F. Brott.

Third. George F. Brott was not entitled to enter or acquir- any right to the land as a mail contractor. His contract was not to carry the mails across or through Territories west of the Mississippi river, and no route across or through such Territories was established when his contract was executed.

Fourth. The land was within the six-mile limit and at St. Cloud, a terminus of the railroad. The right of the Minnesota and Pacific Railroad Company or its successors attached when the route and terminus was defined by law and before the filing of map of definite location.

Fifth. Brott, not being a mail contractor under the act of Congress of March 3rd, 1855, could make no claim, either by settlement or filing, that would exempt the land from the grant to the State for railroad purposes.

16 [Endorsed:] Supreme Court of the United States. Petition of Charles A. Weeks for writ of error to supreme court, State of Minnesota. Filed Aug. 6, 1891. C. P. Holcomb, clerk.

17 CHARLES A. WEEKS, Plaintiff in Error, }
vs.
COLEMAN BRIDGMAN, Defendant in Error. }

Know all men by these presents that we, Charles A. Weeks, as principal, and W. P. Clough and Greenleaf Clark, as sureties, are held and firmly bound unto Coleman Bridgman in the full and just sum of two thousand dollars, to be paid to the said Coleman Bridgman, his attorney, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 30th day of July, A. D. 1891.

Whereas lately, at a general term of the supreme court of the State of Minnesota, begun on the first Tuesday of April, 1891, in a suit pending in said court between Charles A. Weeks, plaintiff, and Coleman Bridgman, defendant, on appeal from a decision of the district court of the State of Minnesota for the county of Stearns, final judgment was rendered against the said plaintiff, Charles A. Weeks, and the said Charles A. Weeks having obtained a writ of error in the Supreme Court of the United States to reverse the judgment aforesaid and filed a copy thereof in the clerk's office of said court, and a citation having issued, directed to the said Coleman Bridgman, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, 1891:

Now, the condition of the above obligation is such that if the said Charles A. Weeks shall prosecute his writ of error to effect
18 and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

W. P. CLOUGH. [SEAL.]
GREENLEAF CLARK. [SEAL.]
CHARLES A. WEEKS. [SEAL.]

STATE OF MINNESOTA, }
County of Ramsey, } *ss:*

W. P. Clough and Greenleaf Clark, being duly sworn, depose and say and each for himself saith that he is worth four thousand dollars over and above all just debts and liabilities and exemptions.

W. P. CLOUGH.
GREENLEAF CLARK.

Subscribed and sworn to before me this 30th day of July, 1891.

J. A. GARDNER,
[SEAL.] *Notary Public, Ramsey County, Minnesota.*

I approve the within bond and the sureties thereto.

JAMES GILFILLAN,
Chief Justice Supreme Court, Minnesota.

Endorsed: 6894. Supreme Court of the United States. Charles A. Weeks, plaintiff in error, *vs.* Coleman Bridgman, defendant in error. Bond. Filed Aug. 4, 1891. C. P. Holcomb, clerk.

19 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1891.

CHARLES A. WEEKS, Appellant, }
vs.
COLEMAN BRIDGMAN, Respondent. }

Paper book.

S. L. Campbell, attorney for appellant; Oscar Taylor, attorney for respondent.

20 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1891.

STATE OF MINNESOTA, }
County of Stearns. }

District Court, Seventh Judicial District.

CHARLES A. WEEKS, Plaintiff, }
vs.
COLEMAN BRIDGMAN, Defendant. }

Summons.

Summons in statutory form.

Complaint.

The complaint of the plaintiff respectfully shows the court and alleges: That the plaintiff now is the owner of and entitled to the immediate possession of all those certain parcels and pieces of land

situate, lying and being in the county of Stearns and State of Minnesota and described as follows, to wit: Lots ten (10), eleven (11) and twelve (12), in block forty (40) in the town of St. Cloud City, as surveyed and platted by T. A. Curtis.

21 That said real estate is vacant and unoccupied, and that defendant claims an estate and interest therein adverse to plaintiff.

Wherefore plaintiff demands judgment.

That the said adverse claim of the defendant to said real estate and the rights of the parties to this action respectively therein may be determined by the court, and that said claim of each of said defendant- may be adjudged by the court to be null and void, and that the title to said real estate is in the plaintiff, and for the costs and disbursements of this action, and for such other and further relief in the premises as may be just.

Dated St. Cloud, Nov. 12, 1884.

W. F. STREET,
Plaintiff's Attorney.

Answer.

Defendant for answer to the complaint of the plaintiff in this action denies that the plaintiff is the owner of or entitled to the possession of the premises described in said complaint or any part thereof, or that he is in any way interested therein, and on the contrary alleges that he, this defendant, at the time of the commencement of this action, was, for a long time prior thereto had been, and now is the owner of said real estate and all thereof in fee-simple.

Wherefore defendant demands judgment against the plain-
22 tiff for his costs and disbursements and for such other and further relief as to the court may seem just and proper.

SEARLE, SEARLE & TOLMAN,
Defendant's Attorneys.

STATE OF MINNESOTA, }
County of Stearns. }

District Court.

CHARLES A. WEEKS, Plaintiff, }
vs.
COLEMAN BRIDGMAN, Defendant. }

The above-entitled action came on for hearing and trial at the general December term, 1889, of the above-named court, and was finally submitted upon requests for findings of fact proposed by each of the parties hereto, on the 25th day of February, A. D. 1889.

The action was tried by the court without a jury, trial by jury having been waived.

S. L. Campbell appeared as attorney for the plaintiff and Oscar Taylor as attorney for the defendant.

From the testimony introduced at the trial and the admissions of the parties, I find as facts:

I.

That the Minnesota and Pacific Railroad Company was duly organized as a railroad corporation under and pursuant to an act of the legislature of the Territory, now State, of Minnesota, approved May 22, 1857.

23 That the St. Paul and Pacific Railroad Company was duly organized by and in conformity to an act of the legislature of the said State, approved March 10, 1862, entitled, "An act to facilitate the construction of the Minnesota and Pacific railroad, and to amend and continue the act of incorporation relating thereto."

That under and by virtue of said act it became the owner of all the lines of railroad formerly owned by the Minnesota and Pacific Railroad Company extending from St. Cloud to Watab in this State, and also to the lands granted to the Territory, now State, of Minnesota to aid in the construction of said branch line of railroad, by the act of Congress approved March 3, 1859, entitled, "An act making a grant of land to the Territory of Minnesota in alternate section to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of certain railroads in said State."

II.

That on the 6th day of February 1864, the First division of the St. Paul and Pacific railroad was duly organized for railroad purposes, which organization was duly confirmed by an act of the legislature of the State of Minnesota, approved February 6th, 1866 and said First division of the St. Paul and Pacific Railroad Company succeeded to all the rights, privileges and lands possessed or granted to the said Minnesota and Pacific Railroad Company, or the said St. Paul & Pacific Railroad Company, as its succes-

24 sor, in any way pertaining to said branch line heretofore referred to.

III.

That after the passage of said act of Congress and prior to December 30th, 1857, the late Territory of Minnesota duly caused to be definitely located, the line of said branch railroad from St. Anthony northward to St. Cloud and along and opposite the section of land hereinafter described and afterwards, at the date last aforesaid, duly caused a map of such definite location to be filed with the Secretary of the Interior of the United States.

That section (13) thirteen, township (124) one hundred and twenty-four, range (28) twenty-eight, according to the Government survey thereof is within six miles of said branch line as it is definitely located, and the land in question forms a part of said section (13) thirteen and is situated in the county of Stearns and State of Minnesota.

IV.

That under and by virtue of said act of Congress, all of section (13) thirteen aforesaid, was by the Secretary of the Interior on the 25th of October, 1864, certified to the State of Minnesota and thereafter, September, 1866, said branch line was constructed to St. Cloud opposite to the land in controversy in this action, and this plaintiff has acquired all the right and title to the lots and parcels of land described in the plaintiff's complaint in this action that was ever possessed by said State or Territory, and has never conveyed the land in controversy or any part thereof.

25 V.

That at the time of the definite location of said branch line of railroad, and the filing of the map thereof in the Interior Department as hereinbefore set forth, the lots 1, 2, 3 and 4, and the S. W. ¼ of the N. W. ¼ and the W. ½ of the S. W. ¼ of said section 13 formed a part of the public lands of the United States and no part of the same has ever been reserved, sold, granted, or other right ever attached thereto, except such right or title as one George F. Brott may have acquired thereto, by his settlement thereon and the proceedings had by him and in his behalf relative thereto as hereinafter stated.

VI.

That on the 9th day of September, 1855, the said George F. Brott entered into a contract with the Government of the United States to carry the United States mail from Minneapolis to St. Cloud in the then Territory, now State, of Minnesota, from the first day of December, 1855, to the 30th day of June, 1858, which contract was in words and figures as follows:

"St. Cloud, Stearns County, M. T.

Contract for special routes, (under 4th section of act of 1825) $200 per am. $50 per qr.

This article of contract made the 6th day of September, in the year 1855, between the United States and George F. Brott, witnesseth:

That whereas, George F. Brott, has been accepted accord-
26 ing to law to supply the offices at St. Cloud, Monticello and Dayton with the mail of the United States from Minneapolis,

Now therefore, the said contractor does undertake, covenant and agree with the United States, and does bind himself:

1. That he will convey the mail of the United States as aforesaid once per week in a safe and secure manner free from wet or other injury under a sufficient oil-cloth or bearskin.

2. That the said contractor shall forfeit one dollar for every hour's delay in the delivery of the mail after the time prescribed in the annexed schedule, but in no event shall exceed three times the price of the trip.

3. That the said contractor shall make good any damage which

may be sustained through the unfaithfulness or want of care of persons employed in the transportation of the mail aforesaid.

For which service, when performed, the said contractor shall receive the net balances of postage (including postage on letters sent which were prepaid by stamps) of letters and newspapers collected at said offices of St. Cloud, Monticello and Dayton, and at any other office which the Postmaster General shall order him to supply with the mail on said route, not however to embrace the office of Minneapolis.

Provided, however, that the same shall not in the whole amount exceed two hundred dollars per annum, to be paid quarter-yearly by the postmaster of the post office or post offices supplied by this route.

The route from Minneapolis by Dayton to Monticello and
27 St. Cloud aforesaid, is to be deemed and considered a post-road during the continuance of this contract, according to the terms and conditions of the fourth section of the act to reduce into one the several acts establishing and regulating the Post Office Department passed March 3, 1825.

This article of contract is to be in operation on the 21st day of December, 1855 and to continue in force until the 30th day of June, 1858, unless the Postmaster General shall deem it expedient to annul the same at an earlier period.

Provided always, that this contract shall be null and void in case the contractor or any person that may be interested in this contract shall become a member of Congress or a postmaster or assistant postmaster; and this contract shall in all respects be subject to the terms and requisitions of the acts of Congress passed on the 21st day of April, in the year of our Lord eighteen hundred and eight, entitled 'An act concerning public contracts.'

In witness whereof, the said contractor has hereunto set his hand and seal the day and year set opposite his name.

(Signed) GEORGE F. BROTT. [SEAL.]

Signed, seal- and delivered in presence of—

H. G. WELLS.

I, George F. Brott, being appointed a mail contractor do swear that I will faithfully perform all the duties required of me and abstain from everything forbidden by the laws in relation to the establishment of post offices and post-roads within the United
28 States, and that I will support the Constitution of the United States.

(Signed) GEORGE F. BROTT.

Sworn and subscribed to before me, the subscriber, a notary public for the Territory of Minnesota, this 2nd day of January, A. D. 1856.

EDWARD S. HALL,
[SEAL.] *Notary Public, M. T.*

SCHEDULE.

(Subject to alteration by the Postmaster General.)

Leave Minneapolis at 9 o'clock a. m. on each Monday.
Arrive at St. Cloud at 4 o'clock p. m. on each Wednesday.
Leave St. Cloud at 9 o'clock a. m. on each Thursday.
Arrive at Minneapolis at 4 o'clock p. m. on each Saturday.

That said Brott did under said contract carry such mail according to the terms thereof.

On the 7th day of August, 1857, the said George F. Brott made application to the United States land office at St. Cloud aforesaid to file therein as mail contractor aforesaid on the southwest quarter of the northwest quarter of section (13) thirteen, township one hundred and twenty-four (124), range twenty-eight (28), with other lands, which would embrace the land in controversy, claiming the right to pre-empt the same as mail contractor aforesaid, under the act of Congress of March 3, 1855, entitled, "An act making appropriations for the service of the Post Office Department during the fiscal year ending the 30th day of June, 1856."

That the said application was by decision of said local land
29 office rejected, and from such decision said Brott appealed to the Commissioner of the General Land Office, by whom the said decision of said local land office was affirmed. From said decision of affirmance said Brott appealed to the Secretary of the Interior, aforesaid, who, by his decision and order, in effect directed that said Brott be allowed to enter said land, and the State of Minnesota and the railroad company be required to relinquish their claim to the same.

This order, relating to relinquishment, was revoked by the Secretary of the Interior on the 5th day of June, 1871.

No further effort was made by said Brott to enter said land simply as such mail contractor, but the entry of the same was thereafter made by him under and in pursuance of the act of Congress, passed for his relief, hereinafter particularly referred to and set forth, he, said Brott, paying for said land the price and sum specified in said act of Congress last above referred to.

VII.

That on May 26th, 1860, the Congress of the United States passed an act entitled, "An act for the relief of George F. Brott," as follows:

"Be it enacted, &c., That George F. Brott be, and he is hereby authorized to enter the following-described land, to wit:

Lots number one (1), two (2), three (3) and four (4), and the southwest quarter ($\frac{1}{4}$), of the northwest quarter ($\frac{1}{4}$) and the west half ($\frac{1}{2}$) of southwest quarter ($\frac{1}{4}$) of fractional section thirteen (13) and
30 the south half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$), and the southeast quarter ($\frac{1}{4}$) of the northwest quarter ($\frac{1}{4}$), and the east half ($\frac{1}{2}$) of the southeast quarter ($\frac{1}{4}$) of section number fourteen (14).

Also, the east half (½) of the northeast quarter (¼) of section number twenty-three (23), and lot number one (1) in section twenty-four (24), all in township one hundred and twenty-four (124), north of range number twenty-eight (28) west, in the district of lands subject to sale at the land office at St. Cloud, Minnesota, said tract containing (562.20) five hundred and sixty-two and twenty-hundredths acres, upon the payment by the said Brott of the usual minimum of one dollar and twenty-five cents per acre therefor."

VIII.

That under the direction of the Secretary of the Interior, and in pursuance of said act of Congress, last above referred to and set forth, the said George F. Brott entered said land described in said act.

And in July, 1871, a patent for the said land issued from the United States to him, said George F. Brott, in the usual form, except that it was in said patent stated that the said land had been certified to the State of Minnesota, for railroad purposes, by mistake.

IX.

That said section (13) thirteen was occupied in part in the year 1855 by persons by whom valuable improvements were erected and maintained thereon; that in June, 1855, that portion of said section (13) thirteen, which is in controversy in this action, was,
31 with other lands, duly surveyed, platted and recorded as a town site by the name of St. Cloud City.

That the tract of land included in the city plat and survey of St. Cloud City, was duly incorporated with other lands as the city of St. Cloud by act of the legislature of the Territory (now State) of Minnesota on March 1st, 1856, and now does and ever since has constituted a part of the said city of St. Cloud, and during all said time has been assessed by lots, blocks and parcels as platted and surveyed under the title claimed by said Brott, and has been in part occupied, improved, sold and transferred under such title.

X.

That the official plat and survey of said township one hundred and twenty-four (124) of range twenty-eight (28) was made and filed in the local land office July 26th, 1857.

XI.

That as mail contractor as aforesaid the said George F. Brott in 1855 selected for and built and established his mail station upon said section thirteen (13), which said station consisted only of stable and building for the use of his teams and carriages, and maintained the same thereon during the term of his said mail contract.

That the said George F. Brott was not a contractor engaged in carrying mails through any of the Territories west of the Mississippi river, in the Territory or State of Minnesota, except from St.

Anthony to St. Cloud, as heretofore stated, nor did the route
32 on which he carried the mail form part of a system, or any part of a route extending across any Territory west of the Mississippi river, but the same terminated at St. Cloud aforesaid, and that no mail was carried west from St. Cloud, under the United States Government, until the latter part of the year 1856, or some time in 1857.

XII.

That the defendant at the time of the commencement of this action had, and was seized, of all the right and title to the lots in controversy that said Brott ever had or possessed under his said patent, and that the defendant claims his right to such title under and by virtue of mesne conveyances duly made, executed and delivered by and through said George F. Brott, and his, said Brott's, grantees, and duly recorded, which said lots in dispute are situated in the city of St. Cloud, in the county of Stearns, aforesaid, and described as follows, to wit: Lots number (10, 11, 12) ten, eleven and twelve in block (40) forty in St. Cloud City, according to the recorded plat *therefore* as surveyed and platted by T. A. Curtis.

XIII.

That the plaintiff is seized of all the right and title to the premises in controversy that the said first division of the St. Paul & Pacific Railroad Company ever had and possessed thereto, and he acquired such right and title under and by virtue of mesne conveyance duly made, executed and delivered, by and through the said railroad company, and its granters.

33 XIV.

That the said premises are vacant and unoccupied.

As conclusions of law I find—

I.

That the plaintiff is not entitled to recover in this action.

II.

That the defendant is the owner in fee and entitled to the possession of the property in controversy, to wit: Lots (10, 11 and 12,) ten, eleven and twelve in block (40) forty as above described.

III.

That the defendant is entitled to recover his costs and disbursements in this action.

And judgment is hereby ordered accordingly.

L. L. BAXTER,
District Judge.

(NOTE.)—As the evidence upon the trial of this action is substantially the same as it was upon the former trial it follows that to be in line with the supreme court of this State I must order judgment for the defendant, which I have done.

L. L. B.

Endorsed: Amended findings, district court, Stearns Co., Minn. A. L. Cramb, clerk, by H. Mueller, deputy. Filed June 12, 1890.

PHILADELPHIA

34 STATE OF MINNESOTA, }
County of Stearns. }

District Court, Seventh Judicial District.

CHARLES A. WEEKS, Plaintiff, }
vs.
COLEMAN BRIDGMAN, Defendant. }

Judgment, June 26, 1890.

This action having been duly brought to trial at the general December, 1889, term of said court, the Hon. L. L. Baxter, presiding judge, a jury having been duly waived and said action tried by the court, with the consent of both parties thereto, and the said court thereafter, and on the sixteenth day of May, A. D. 1890, having duly made and filed its findings of fact and law therein, wherein and whereby it is found that the defendant is the owner in fee-simple of the real estate in controversy, to wit: The lots numbered ten (10), eleven (11) and twelve of block number forty (40) in the town of St. Cloud City, according to the plat and survey thereof made by T. A. Curtis and on file and of record in the office of the register of deeds in and for said Stearns county; and that the said plaintiff has no title, right, interest, claim or demand in or to said real estate, and directing that judgment be entered in favor of said defendant, Coleman Bridgman, accordingly, and for the costs and disbursements by said defendant paid and incurred in said action.

Now, to wit: on this twenty-sixth day of June, A. D. 1890,
35 and on motion of Oscar Taylor, Esq., attorney for said defendant, it is considered, determined and adjudged that the said defendant, Coleman Bridgman, is the owner in fee-simple and entitled to the exclusive possession of that certain real estate situate and being in the city of St. Cloud, county of Stearns and State of Minnesota, described as follows, to wit:

The lots numbered ten (10), eleven (11) and twelve (12) of block number forty (40) in the town of St. Cloud City, according to the plat and survey thereof made by T. A. Curtis, and on file and of record in the office of the register of deeds in and for said Stearns county, and that the said defendant, Coleman Bridgman, have and recover of said plaintiff, Charles A. Weeks, the sum of one hundred, thirty-two and sixty-two one-hundredths dollars costs and disbursements taxed and allowed in said action.

Dated this 26th day of June, A. D. 1890.

A. L. CRAMB,
Clerk of District Court.

October 6th, 1890, filed order of court reducing bill of costs to $118.12, and judgment is hereby amended accordingly.

A. L. CRAMB, *Clerk.*

36 STATE OF MINNESOTA, } ss:
County of Stearns, }

District Court.

CHARLES A. WEEKS, Plaintiff, }
vs.
COLEMAN BRIDGMAN, Defendant. }

The above-entitled matter duly came on for hearing before the court upon the objections on the part of the plaintiff to certain items of the bill of costs and disbursements, taxed in the above-entitled action, and the court having heard the argument of counsel thereof, and duly advised in the premises.

It is now ordered, that the clerk's taxation of costs in the above-entitled action, be and the same hereby is affirmed, except as to one item of statutory costs, in the sum of $10.00 and one for $4.50 charged for making a plat, which items are hereby disallowed, and the clerk is hereby directed to strike the same from the bill of costs and deduct therefrom the amount of said items, which is the sum of $14.50.

Dated October 2nd, 1890.

By the court.

L. L. BAXTER, *Judge.*

Endorsed: Filed Oct. 6th, 1890. A. L. Cramb, clerk.

37 STATE OF MINNESOTA, }
County of Stearns. }

District Court, Seventh Judicial District.

CHARLES A. WEEKS, Plaintiff, }
vs.
COLEMAN BRIDGMAN, Defendant. }

To Oscar Taylor, Esq., attorney for the above-named defendant, and to A. L. Cramb, Esq., clerk of said district court:

You will please to take notice: that the above-named plaintiff hereby appeals to the supreme court of the State of Minnesota, from the judgment of the district court, entered herein, on the 26th day of June, A. D. 1890, and from each and every part thereof.

Dated this 10th day of December, A. D. 1890.

S. L. CAMPBELL AND
REYNOLDS & STEWART,
Attorneys for Plaintiff.

38 (Endorsed:) State of Minnesota, supreme court. Charles A. Weeks, plaintiff, *vs.* Coleman Bridgman, defendant. Notice of appeal. Due service of the within notice of appeal is hereby

admitted this 6th day of December, A. D. 1890. Oscar Taylor, attorney for defendant. A. L. Cramb, clerk, by Herman Mueller, deputy. District court, Stearns Co., Minn. Filed Dec. 16, 1890. A. L. Cramb, clerk, by H. Mueller, deputy.

39 STATE OF MINNESOTA, }
County of Stearns. }

District Court.

I, A. L. Cramb, clerk of the district court in and for the county of Stearns, in the State of Minnesota, do hereby certify that I have compared the annexed and foregoing copies of complaint, answer, findings, and order for judgment, notice of motion to amend findings, order relating to proposed amendments, amended findings, defendant's statement of costs and disbursements, notice of taxation of costs, objections to taxation of costs, copy of judgment, order of court deducting $14.50 from bill of costs, and notice of appeal, in the cause entitled Charles A. Weeks, plaintiff, *vs.* Coleman Bridgman, defendant, with the originals remaining on file in my office, and that the same are true and correct transcripts of said originals and of the whole thereof.

Witness my hand and the seal of said court, at the city of St. Cloud, in said county, this 19th day of January, A. D. 1891.

[SEAL.] A. L. CRAMB, *Clerk.*

40 5798.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1889.

CHAS. A. WEEKS, Respondent, }
vs. } No. 160. Syllabus.
COLEMAN BRIDGMAN, Appellant. }

The congressional land-grant act of March 3, 1857, was in itself a grant conveying to the State the legal title of the lands found to fall within its operation. The certification of lands to the State by the Secretary of the Interior under the law of 1854 did not affect the legal title of such lands.

Only upon the definite location of the lines of railroad referred to in the grant by filing maps thereof in the Department of the Interior did the grant become applicable to particular lands so as to prevent the acquisition of vested rights by pre-emption, which would prevail notwithstanding the grant.

By implication from the terms of the act lands to which the right of pre-emption should attach before such definite locations were excepted from it.

Before the definite location of one of the land-grant roads one Brott filed his application to pre-empt certain lands as a mail
41 station under the act of Congress of 1855, allowing pre-emptions by certain mail-route contractors. The application was

refused by the local officers, and their decision was affirmed upon appeal to the Commissioner of the General Land Office upon the sole ground that the mail route of the applicant was not such as the act of 1855 contemplated. The Secretary of the Interior, upon appeal to him, reversed the former rulings and decided that the entry should be allowed, upon proper proofs being made. This was long after the definite location of the road within the limits of whose grant the land was found to be situated. Held, that the right of pre-emption attached as early, at least, as the time of the filing of the application, and so the land was excepted from the operation of the granting act of 1857, and subsequent patent to the pre-emptioner (even though not made upon that pre-emption claim) conveyed the title.

A definite location of the road is required to be established in the manner stated, even with respect to land in the vicinity of places named in the granting act as defining the route.

42 5798.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1889.

CHAS. A. WEEKS, Respondent,
vs.
COLEMAN BRIDGMAN, Appellant. } No. 160. Opinion.

This is an action under the statute to determine adverse claims to vacant and unoccupied real estate. Both parties claim title, the plaintiff through the congressional land grant to the Territory of Minnesota March 3, 1857 (11 St. at Large, p. 195), to aid in the construction of certain railroads; the defendant, through one Brott, who is claimed to have made a pre-emption entry of the land prior to the definite location of the road in aid of which the grant of 1857 was made, having the effect to except the land from the operation of that grant. The land was certified to the State by the Secretary of the Interior in October, 1864, as a part of the grant inuring to it under the act of 1857, and the plaintiff has acquired whatever title or interest the State had under that congressional grant. In 1871, pursuant to the provisions of an act of Congress passed for the relief of Brott in 1860, the same land was patented by the
43 United States to him, and this defendant has whatever title or interest Brott acquired thereby.

We will state somewhat more particularly the facts upon which these conflicting claims of title rest: The land is part of an odd-numbered section (13) and is within the six-mile limit of the line of road as definitely located, in aid of which the grant of 1857 was made, and the title passed to the State unless Brott's pre-emption claim had the effect of excepting this land from the operation of the grant. The line of the railroad—the branch line, extending from St. Anthony to St. Cloud, of the St. Paul & Pacific (the successor of the Minnesota & Pacific) railroad—was definitely located

by the filing of the map of location in the proper department at Washington December 30, 1857. By an act of Congress of March 3, 1855 (10 St. at Large, p. 683), entitled "An act making appropriations for the service of the Post Office Department during the fiscal year," etc., it was enacted (S. 1) that "each contractor engaged or to be engaged in carrying mails through any of the Territories west of the Mississippi shall have the privilege of occupying stations at the rate of not more than one for every 20 miles of the route on which he carries a mail, and shall have a pre-emptive right therein when the same shall be brought into market to the extent of 640 acres, to be taken contiguously and to include his improvement." In September, 1855, Brott entered into a contract with the Government to carry the mail from Minneapolis to St. Cloud from December, 1855, to June, 1858, and he did carry the mail in
44 accordance with that contract. August 11, 1857, Brott filed in the local land office his application to enter certain described land, embracing that now in controversy, under the act of 1855 above referred to, alleging his settlement upon and improvement of the land as a mail station in January, 1856. The court finds, upon sufficient evidence presented in this case, that Brott did so occupy and improve the land. This application was rejected by the local land officers, and upon appeal to the Commissioner of the General Land Office their decision was affirmed for the reason, as the record evidence discloses, that the mail route covered by Brott's contract was deemed not to be a link in nor part of a connected route from the line of the States west of the Mississippi river to the Pacific ocean, and hence, as was supposed, not such a route as the act of 1855 contemplated. Brott appealed to the Secretary of the Interior. That officer in August, 1861, reversed the rulings of the land officers and of the Commissioner of the General Land Office. It was decided that the route was within the terms of the act of 1855, and that Brott's contract entitled him to pre-empt the stations occupied upon compliance with the provisions of the law, and that he should therefore be permitted to enter the lands mentioned in his application, with certain exceptions not necessary to be referred to, upon proof of the performance of his contract and of the occupation of the station and upon compliance with the laws and regulations applicable to the case. Before Brott's appeal was thus finally decided, on May 26, 1860, Congress passed an act for
45 the relief of Brott, declaring that he should be allowed to enter the land in question upon payment of the usual minimum price. Brott is found by the courts to have made no further effort to enter the land simply as a mail contractor, but it is found that he did enter the same under the act for his relief above referred to, paid for the same, and in 1871 patent was issued to him, as before stated, it being recited in the patent that the land had previously been erroneously certified to the State. The court concluded, on these facts and others set forth in the findings, which we do not deem material for the decision of this appeal, that the plaintiff was the owner in fee of this land and entitled to possession. The defendant appealed from an order refusing a new trial.

The sole issue in this action relates to the legal title. The defendant only opposes to the plaintiff's asserted title a denial and a claim of title in himself. No facts are pleaded which might entitle the defendant to equitable relief, and the decision of the court below is solely upon the issue as to the legal title. We state, without pausing to comment upon, some propositions which must be regarded as having been established by numerous decisions of the Supreme Court of the United States. The act of March 3, 1857, was in itself a grant and effectual as such to transfer the title of lands to which it should be found to be applicable, and the certification, in 1864, was only evidence, not conclusive in its character, that the lands so certified had become vested in the State under
46 the grant. The certification transferred no title. Wright *v.* Roseberry, 121 U. S., 488 (7 Sup. C't Rep., 985); Minn. Land Co. *v.* Davis, 40 Minn., 455 (42 N. W. Rep., 299). We shall hereafter refer again to this certification. Although this grant was made *in præsenti*, it was only by the definite location of the line of the railroad that it acquired precision and became applicable to particular land, so as to prevent the acquisition of vested rights by pre-emption which would prevail over those asserted under the prior granting act. The laws relating to pre-emption remained operative until the line of location was definitely fixed, even as to lands which might be found to be within the proper limits of the grant. Baker *v.* Gee, 1 Wall., 333; Leavenworth, etc., R. Co. *v.* U. S., 92 U. S., 733; Missouri, Kansas & Texas R'y Co. *v.* Kansas Pacific R'y Co., 97 U. S., 491; Kansas Pacific R'y Co. *v.* Dunmeyer, 113 U. S., 629 (5 Sup. C't Rep., 566); Winona & St. Peter R. Co. *v.* Barney, 113 U. S., 618, 626 (5 Sup. C't Rep., 606). Such precision was given to the grant, as to lands lying in place, by the filing of the proper map of definite location of road in the Department of the Interior. Van Wyck *v.* Knevals, 106 U. S., 360 (1 Sup. C't Rep., 336), and authorities above cited. The act of 1857, after declaring (S. 1) "that there be, and is hereby, granted to the Territory * * * every alternate section of land, designated by odd numbers, for six sections in width on each side of each of said roads and branches," further provides: "But in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any section or any parts thereof, granted
47 as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful," etc., the act providing for the selection of indemnity lands to an amount "equal to such lands as the United States have sold or otherwise appropriated or to which the rights of pre-emption have attached as aforesaid." By implication from the terms of the act, all lands to which the rights of pre-emption should attach before the definite location of the line of the road were reserved from the grant. Leavenworth, etc., R. Co. *v.* U. S., 92 U. S., 733, 748.

We are of the opinion that Brott's pre-emption claim must be regarded as having attached to this land prior to the definite location of the railroad in December, 1857, so that the title did not pass under the congressional grant to the State. The act of 1855

authorized mail contractors upon such routes as were therein referred to to occupy mail stations upon the public lands, and declared that they should have a right to pre-empt the same. Brott was a contractor, carrying the mail west of the Mississippi river from Minneapolis to St. Cloud. He occupied this land as a mail station on that route prior to the grant of 1857, and in August, 1857, before the filing of the map of the location of the road, he filed his application for pre-emption in the proper local land office. If it had been then allowed there would have been little reason to doubt that his pre-emption right would prevail over any adverse claims under the grant of 1857. But the question whether his claim then attached to this land, so as to except it from the
48 operation of that grant, did not depend upon his claim being allowed before the location of the road became fixed. The laws entitled him, when his claim was disallowed, to invoke by appeal the decision of the Commissioner of the General Land Office and of the Secretary of the Interior, and the final decision of this department of the Government would be a decision upon the original application filed in August, 1857. It would have the same effect as though it had been made at once upon the filing of the application. The right of pre-emption, if it attached at all, attached as early, at least, as the filing of the application. The claim was before the department to which the administration of such claims and grants had been by law committed for adjudication when the land grant of 1857 first acquired precision, so as to become applicable to particular lands, and the fact that it was not finally allowed until 1861 did not affect the result. Newhall *v.* Sanger, 92 U. S., 761; Kansas Pacific R'y Co. *v.* Dunmeyer, 113 U. S., 629 (5 Sup. C't Rep., 566); Doolan *v.* Carr, 125 U. S., 618 (8 Sup. C't Rep., 1228). It is unnecessary to consider whether it would have made any difference if Brott's claim had been finally disallowed. In Kansas Pacific R'y Co. *v.* Dunmeyer, *supra*, the court says (113 U. S., 644; 5 Sup. C't Rep., 573): "Of all the words in the English language this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant
49 that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land, it was excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds." It is unimportant, as the decisions above cited show, that Brott did not afterwards perfect his title under his original pre-emption claim alone, but availed himself of the right conferred by the congressional act which, pending the decision upon his application, had been passed for his relief.

It is contended that Brott did not comply with the regulations of the land department as to the manner of presenting his claim. It is at least doubtful whether, if such were the fact, that would effect

the question under consideration; but it does not appear that such was the case. It is apparent from the record before us that all of the proceedings in the prosecution of this claim are not embodied in this case, and it also appears that the only ground upon which the claim was rejected by the land officers and the Commissioner was that to which we have already referred, their ruling upon which was afterwards reversed. We see no sufficient reason to support the respondent's contention that this pre-emption claim was void upon its face. It may be added that whatever may be the proper construction of the postal pre-emption act of 1855 it is to be as-
50 sumed, at least in the absence of proof, that the facts of the case were such as to justify the decision finally made by the Secretary of the Interior. It would not necessarily follow from the fact that Brott's route extended no further than St. Cloud that the system of which that was a part was not such as to make the act of 1855 properly applicable. We do not mean, however, to intimate that if all the facts upon which the decision of the Secretary of the Interior was made were presented in the record of this action the court would review and redecide as to the validity of Brott's claim.

It was suggested orally upon the argument before us that as St. Cloud was named in the granting act as a point in the route of the railroad the grant took effect at once as to the land in question, which is within the city of St. Cloud. We think, however, that no such exception should be recognized to the rule which has so long prevailed in the construction of such grants, that the act contemplates a definite location of the line of the road by the action of the State or of the railroad company before the grant, which is in terms indefinite and a float, shall be deemed to attach to particular lands, and the operation of the pre-emption laws as to such lands cease. The language of the act which we have recited—"in case it shall appear * * * when the lines or routes * * * are definitely fixed"—justifies the rule of construction which has long been adhered to in the administration of such grants and in the decisions of the courts without, so far as we know, any such modification as is now suggested.

51 We have already said that the certification of this land to the State was not effectual to transfer the title. We suppose this certification to have been made under the act of August 3, 1854 (10 U. S. St. at Large, p. 346), entitled "An act to vest in the several States and Territories the title in fee of the lands which have been or may be certified to them." It provides "that in all cases where lands have been or shall hereafter be granted by any law of Congress to any one of the several States or Territories and where said law does not convey the fee-simple title of such lands or require patents to be issued therefor the list of such lands which may have been or may hereafter be certified * * * shall be regarded as conveying the fee-simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress and intended to be granted thereby, but where lands embraced in such lists are not of the character embraced by such acts

of Congress and are not intended to be granted thereby said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby." The certificate of these lands did not affect the title, for the reason that the granting act did by its own force convey the title of all lands to which it was applicable. Furthermore, Brott's pre-emption right having attached before the location of the road, as it was contemplated such rights might attach, the land cannot be deemed to have been intended to pass to the State by the grant.

52 We do not deem it necessary to consider whether by Brott's occupation of the land prior to the enactment of the granting act of 1857 as a mail station pursuant to the act of 1855 he acquired such a right of pre-emption as would bring the case within the proviso of the grant of 1857, excepting from its operation "all lands heretofore reserved to the United States by any act of Congress or in any other manner by competent authority for the purpose of aiding in any object of internal improvement or for any other purpose whatsoever."

Order reversed.

DICKINSON, *J.*

Collins, J., did not sit in this case.

Endorsed: No. 5798. State of Minnesota, supreme court. C. A. Weeks, appellant, *vs.* Coleman Bridgman, respondent. Opinion and syllabus. Filed August 5, 1889. J. D. Jones, clerk. April term, A. D. 1889. Dickinson, J.

53 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1889.

WEDNESDAY MORNING, 9:30 O'CLOCK, *April* 24, *A. D.* 1889.

Court convened pursuant to adjournment, all the justices being present.

CHARLES A. WEEKS, Respondent,
vs.
COLEMAN BRIDGMAN, Appellant. } Cal. No., 160. Reg. No., 5798.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel for respective parties, submitted to the court for decision, and taken under advisement.

A true record.

[Seal of the Supreme Court, State of Minnesota.]

Attest: J. D. JONES, *Clerk.*

[Endorsed:] 5798. State of Minnesota, supreme court. Copy of minutes of argument. Filed Aug. 17, A. D. 1889. J. D. Jones, clerk.

54 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1889.

CHARLES A. WEEKS, Respondent,
vs.
COLEMAN BRIDGMAN, Appellant. } No. 160.

Appeal from district court, seventh judicial district, county of Stearns.

This cause having been duly argued and submitted at the general April term of this court, A. D. 1889, upon the return to the appeal herein:

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the order of the court below herein appealed from be, and the same hereby is, in all things reversed, and that the appellant above named have judgment accordingly.

Entered Aug. 17, A. D. 1889.

By the court:

[Seal of the Supreme Court, State of Minnesota.]

Attest: J. D. JONES, *Clerk.*

[Endorsed:] No. 5798. State of Minnesota, supreme court. Copy of order for judgment. Filed Aug. 17, A. D. 1889. J. D. Jones, clerk. Entered on page 268 "G."

55 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1889.

CHARLES A. WEEKS, Respondent,
vs.
COLEMAN BRIDGMAN, Appellant. } No. 160.

Pursuant to an order of court duly made and entered in this cause on the 17th day of August, A. D. 1889—

It is here and hereby determined and adjudged that the order of the court below herein appealed from, to wit, of the district court of the seventh judicial district, sitting within and for the county of Stearns, be, and the same hereby is, in all things reversed.

And it is further determined and adjudged that the appellant above named do have and recover of said Charles A. Weeks, respondent herein, the sum and amount of one hundred sixty-two & $\frac{54}{100}$ dollars ($162.54) costs and disbursements in this cause in this court, and that said appellant have execution for the enforcement thereof.

Dated and signed this 17th day of August, 1889.

By the court.

[Seal of the Supreme Court, State of Minnesota.]

Attest: J. D. JONES, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25 00
Clerk's fees for making return	15 44
Printer's fees for printing paper book and briefs, etc	95 00
Clerk's fees, supreme court	9 75
Maps in evidence	3 50
Filing mandate and docketing transcript	1 00
6 affidavits and acknowledgments	1 50
Postage	50
Copying return for printer	10 85
	$162 54

56 [Endorsed:] 5798. State of Minnesota, supreme court. Transcript of judgment. Filed Aug. 17, A. D. 1889. J. D. Jones, clerk. —— ——, attorney for —— ——. Page No. 323, "M" Book.

57 6894.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1891.

C. A. WEEKS, Appellant, *vs.* COLEMAN BRIDGMAN, Respondent. } No. 114. Syllabus.

The decision in Weeks *v.* Bridgman, 41 Minn., 353, reaffirmed.

The land in controversy is within the limits of the land grant of the St. Paul & Pacific R. R. Co., which claims title under the act of March 3, 1857.

It is included in a section of land which was improved and occupied by a mail contractor in 1855, who claimed to be entitled to enter the same by pre-emption under the act of March 3, 1855, and his application to enter the same, afterwards recognized and approved by the Land Department of the Government, was made before the R. R. Co. became entitled to the land under the provisions of the land-grant act. Held, that a pre-emption right had attached within the meaning of the last-named act, and that the section of land in controversy did not enure to the railway company as a part of its land grant.

58 6894.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1891.

C. A. WEEKS, Appellant, *vs.* COLEMAN BRIDGMAN, Respondent. } No. 114. Opinion.

The principal questions involved in this appeal were, upon full consideration, determined when the case was here before, 41 Minn.,

353. We do not deem it necessary to reconsider them. The material facts and the acts of Congress under which the parties assert their claims are set forth in the opinion as reported. The record now before us presents substantially the same case as before. The defendant, however, relies upon a single additional finding of fact, which, it is claimed, shows that the pre-emption claim of Brodt, under whom defendant derives title, was a nullity, and that therefore the land in question passed to the railway company, under which plaintiff claims title by virtue of its land grant. Brodt was a mail contractor in 1855, having a contract to carry the U. S. mail from Minneapolis to St. Cloud, in the Territory of Minnesota west of the Mississippi river, and as such settled upon and improved the section containing the lot in controversy some time during
59 that year. It is now found by the trial court as a fact that Brodt established his mail station on said section in 1855 and maintained the same during the term of his contract, but that he "was not a contractor engaged in carrying the mails" through any of the Territories west of the Mississippi river, "except from Minneapolis to St. Cloud, in the Territory of Minnesota," nor did the route on which he carried the mail form part of a system or any part of a route extending across any Territory west of the Mississippi river, but the same terminated at St. Cloud aforesaid." Under this finding it is insisted that Brodt's entry was unauthorized by the act of March 3, 1855, and that he could acquire no pre-emption right as mail contractor to the land in controversy. His settlement and application were, however, prior in time to the claim of the railroad company under its grant and were recognized by the Land Department of the Government, which assumed jurisdiction of the case and, through the Secretary of the Interior, ordered that Brodt be allowed to enter the land upon filing the proper proofs. This gave him a standing in that tribunal to prosecute his claim to the land under the act of 1855. The department had jurisdiction of that class of cases to determine the facts in respect to his mail contract and route and it was not so clear upon the face of his application that it was unauthorized and void that the department might not entertain the application and determine its merits upon the case made before it. Lunilan *v.* Conlan, 104 U. S., 426.

Brodt's pre-emption right had then already attached within
60 the meaning of the land-grant act in question here, which is to be construed most strongly against the railway company, and all doubts whether the land passed to the latter must be resolved in favor of the Government and its grantee, Leavenworth R. R. *v.* U. S., 92 U. S., 733; nor is it material that Brodt subsequently failed to establish his right to the land by proof before the land office. His prior settlement and claim and the initiation of the proceedings in the land office were sufficient to segregate the land from the public domain and take it out of the operation of the land-grant act. Whitney *v.* R. R., 132 U. S., 362.

It was not the intention of Congress that the right of the railway company should also attach in such cases and thus place the pre-emption claimant and the railway company in the position of con-

testants before the Land Department. R. R. *v.* Dunmeyer, 113 U. S., 641.

The decision of the Secretary of the Interior established the fact that Brodt's pre-emption claim had attached within the meaning of the land-grant act when the grant acquired precision, and therefore the right of the railway Co. did not attach. We do not deem the finding in question material and see no reason for modifying our former decision.

Judgment affirmed.

VANDERBURGH, *J.*

Collins, J., did not sit.

61 Endorsed: No. 6894. State of Minnesota, supreme court. C. A. Weeks, appellant, *vs.* Coleman Bridgman, respondent. Opinion and syllabus. Judgment affirmed. Filed June 30, 1891. C. P. Holcomb, clerk. April term, A. D. 1891. Vanderburgh, J.

62 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1891.

TUESDAY MORNING, 9:30 o'CLOCK, *June 2d, A. D.* 1891.

Court convened pursuant to adjournment, all the justices being present.

C. A. WEEKS, Appellant, *vs.* COLEMAN BRIDGMAN, Respondent. } Cal. No., 114. Reg. No., 6894.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel for appellant and submitted to the court for decision by counsel for respondent upon the paper book and briefs and taken under advisement.

A true record.

[Seal of the Supreme Court, State of Minnesota.]

Attest: C. P. HOLCOMB, *Clerk.*

[Endorsed:] 6894. State of Minnesota, supreme court. Copy of minutes of argument. Filed July 11, A. D. 1891. C. P. Holcomb, clerk.

63 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1891.

C. A. WEEKS, Appellant, *vs.* COLEMAN BRIDGMAN, Respondent. } No. 114.

Appeal from district court, seventh judicial district, county of Stearns.

This cause having been duly argued and submitted at the general April term of this court, A. D. 1891, upon the return to the appeal herein—

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below herein appeal- from be, and the same hereby is, in all things affirmed, and that the respondent above named have judgment accordingly.

Entered July 11, A. D. 1891.

By the court.

[Seal of the Supreme Court, State of Minnesota.]

Attest: C. P. HOLCOMB, *Clerk.*

[Endorsed:] No. 6894. State of Minnesota, supreme court. Copy of order for judgment. Filed July 11, A. D. 1891. C. P. Holcomb, clerk. Entered on page 181, "H."

64 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1891.

C. A. WEEKS, Appellant,
vs.
COLEMAN BRIDGMAN, Respondent. } No. 114.

Pursuant to an order of court duly made and entered in this cause on the 11th day of July, A. D. 1891—

It is here and hereby determined and adjudged that the judgment of the court below, herein appealed from, to wit, of the district court of the seventh judicial district, sitting within and for the county of Stearns, be, and the same hereby is, in all things affirmed.

And it is further determined and adjudged that the respondent above named do have and recover of said C. A. Weeks, appellant herein, the sum and amount of seventy dollars ($70.00), costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 11th day of July, 1891.

By the court

[Seal of the Supreme Court, State of Minnesota.]

Attest: C. P. HOLCOMB, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25 00
Clerk's fees for making return of testimony under rule 3	14 00
Printer's fees	21 00
Clerk's fees, supreme court	10 00
Execution and return	
Filing mandate and docketing transcript	
— affidavits and acknowledgments	
Postage	
Copying return for printer	
	$70 00

[Endorsed:] 6894. State of Minnesota, supreme court. Transcript of judgment. Filed July 11, A. D. 189–. C. P. Holcomb, clerk. —— ——, attorney for ——. Page No. 47, "P" Book.

65 STATE OF MINNESOTA:

OFFICE OF CLERK OF SUPREME COURT.

I, C. P. Holcomb, clerk of the supreme court of the State of Minnesota, do hereby certify that the attached papers, viz., certificate to supreme court, answer of defendant and appellant, findings of fact and conclusions of law of district court, memorandum of district court, opinions of supreme court of State of Minnesota, minutes of argument in supreme court, order for judgment in supreme court, judgment of supreme court, notice of appeal to supreme court with proof of service thereon, final judgment in district court from which appeal was taken, order affirming judgment of district court, final judgment of supreme court, and petition for writ of error with assignments of error, and the bond on appeal to U. S. Supreme Court, are true copies of the originals remaining on file and of record in my office, and that I have carefully compared said copies with said original files and records, and that the same are true and correct transcripts therefrom and thereof and all thereof, and that, together with the writ of error in said cause and the citation therein herewith returned and attached, with admission and proof of service, they form and are returned as an answer and return to said writ of error and in obedience to the command therein contained.

Witness my hand and the seal of said court this 21st day of August, 1891.

[Seal of the Supreme Court, State of Minnesota.]

C. P. HOLCOMB, *Clerk.*

[Endorsed:] State of Minnesota, supreme court. Charles A. Weeks, plaintiff in error, *vs.* Coleman Bridgman, defendant in error. Return to U. S. S. Court.

Endorsed on cover: Case No. 14,830. Minnesota supreme court. No. 284. Charles A. Weeks, plaintiff in error, *vs.* Coleman Bridgman. Filed August 31, 1891.

FILED.
OCT 7 1895
JAMES H. McKENNEY
CLERK

In the Supreme Court
Of the United States.

OCTOBER TERM, 1895.

CHARLES A. WEEKS,
Plaintiff in Error,

vs.

44

COLEMAN BRIDGEMAN,
Defendant in Error.

Substituted Brief.

M. D. GROVER,
Attorney for Plaintiff in Error.

In the Supreme Court
Of the United States.

OCTOBER TERM, 1895.

CHARLES A. WEEKS,
Plaintiff in Error,

vs.

COLEMAN BRIDGEMAN,
Defendant in Error.

Substituted Brief.

This case comes up on writ of error to the Supreme Court of the State of Minnesota.

FEDERAL QUESTION.

The plaintiff in error claims title through sundry mesne conveyances from the First Division of the St. Paul and Pacific Railroad Company, one of the beneficiaries of the grant of lands to the Territory of Minnesota by act of Congress approved

March 3, 1857, in aid of the construction of certain railroads.

Defendant in error claims title through sundry mesne conveyances from one Geo. F. Brott, to whom patent was issued in July, 1871, under the provisions of an act of Congress, approved May 26, 1860, (12 Stats., 843) for the relief of said Brott.

The land in controversy is within the place limits of the railroad grant and the title of plaintiff in error is good unless at the time the grant became operative and the title to the granted lands passed to the territory of Minnesota, such a prior right had attached as to exclude the land in controversy from the grant.

STATEMENT OF FACTS.

The territory of Minnesota accepted the grant made by the act of March 3, 1857, and by an act of its legislature approved May 22, 1857, (Laws of 1857, Ex. Sess., page 3,) organized the Minnesota and Pacific Railroad Company, and granted to said company the lands granted by congress in aid of the construction of the road from Stillwater to the Sioux Wood river, and the branch line from St. Anthony, via. St. Cloud to the Red River. The route of the branch line from St. Anthony northward to and beyond St. Cloud, opposite the land involved in this suit, was definitely fixed and a map thereof filed with the secretary of the interior December 30, 1857, and the land in controversy is part of an odd section within six miles of said

branch line as thus definitely fixed. (Findings, par. 3, of Record, p. 11.)

The Minnesota and Pacific Railroad Company failed to construct the road, whereupon the legislature of the state resumed the grant and transferred it to the St. Paul and Pacific Railroad Company, a corporation organized under the provisions of an act of the legislature approved March 10, 1862. (Findings, par. 1, p. 11.) Pursuant to the provisions of an act of the legislature of the state of Minnesota approved February 6, 1864, (Sp. Laws of 1864, p. 174,) the First Division of the St. Paul and Pacific Railroad Company was organized and it succeeded to all the rights, privileges and lands granted to the Minnesota and Pacific Railroad Company, or the St. Paul and Pacific Railroad Company, pertaining to the branch line of railroad from St. Anthony, northward. This organization and transfer was ratified and confirmed by an act of the legislature of the state approved February 6, 1866, Sp. Laws of 1866, p.11; Findings, par. 2, p. 11)

All of section thirteen, town 124, R. 28, of which the land in controversy is part, was certified to the state of Minnesota by the secretary of the interior October 25th, 1864, as a part of the land granted by the act of 1857. The branch line of railroad was constructed from St. Anthony to St. Cloud, opposite the land in controversy, during the month of September, 1866, and plaintiff in error, has acquired all the right and title to the lots in question that was ever possessed by the

territory or state of Minnesota, or the First Division of the St. Paul and Pacific Railroad Company. (Findings, par. 4, p. 12; par. 13, p. 16.)

CLAIM OF DEFENDANT IN ERROR.

George F. Brott, on the 9th day of September, 1855, entered into a contract with the United States to carry the mail from Minneapolis to supply the offices at St. Cloud, Monticello and Dayton. This route was about sixty-five miles in length, running parallel to the Mississippi river. The contract reads:

"The route from Minneapolis, by Dayton, to Monticello and St. Cloud aforesaid, is to be deemed and considered a post road during the continuance of this contract."

Findings, par. 6, p. 13.

By act of congress approved March 3, 1855, (10 Stats., 683,) it is provided:

"That each contractor engaged or to be engaged in carrying mails through any of the territories west of the Mississippi shall have the privilege of occupying stations at the rate of not more than one for every twenty miles of the route on which he carries a mail, and shall have a pre-emption right therein when the same shall be brought into market, to the extent of six hundred and forty acres, to be taken contiguously and to include his improvements."

On August 7th, 1857, said Brott made application to the United States land office at St. Cloud to file a pre-emption declaratory statement for the

S. W. quarter of N. W. quarter of said section 13, T. 124, R. 28, with other lands contiguous, claiming the right to do so as such mail contractor. The local land officers refused to receive his application or allow his entry to go of record, but, on the contrary, rejected it, for the reason that he was not a qualified pre-emptor, the contract not being one to carry the mails through the territory west of the Mississippi. On appeal, the decision of the local land officers was affirmed by the commissioner of the general land office. Brott, thereupon, appealed to the secretary of the interior, who reversed the commissioner's decision, and held that Brott's mail route was within the contemplation of the act of 1855, and that he should be permitted to enter the land upon making proof of his performance of his contract and the occupation of the land as a mail station. Brott did not make any further claim or effort to enter the land as such mail contractor. Neither did he offer or make proof of his occupation of the land as a mail station to the officers of the land department, as he was required to do by the secretary's decision, but, on the contrary, he subsequently made entry under the provisions of the act of congress of May 26, 1860, passed for his relief. The act of 1860 provides as follows:

"Be it enacted, that George F. Brott be, and he is hereby authorized, to enter the following described land, to-wit: (omitting the description), in the district of lands subject to sale at the land office at St. Cloud, Minnesota, said tracts containing five hundred sixty-two and twenty-hundredths

acres, upon the payment by said Brott of the usual minimum of one dollar and twenty five cents per acre therefor; provided, that said act shall in no wise interfere with or embrace any land to which there is a valid subsisting claim under the preemption laws of the United States; and the commissioner of the general land office is directed to issue a patent on said entry."

His entry was made under this act on November 3rd, 1866, and in July, 1871, a patent for the land was issued to him by virtue of such entry and the payment of the price named. (Findings, par. 6, 7, and 8, pp. 14, 15.)

At the time of the commencement of the action the defendant in error was seized of all the right and title to the land in suit that Brott had under said patent. (Findings, par. 12, p. 16.)

THE ISSUE.

The action is at law and was brought under the statute of the state of Minnesota which permits any person having or claiming title to vacant and unoccupied lands to bring an action against any person claiming an adverse interest therein for the purpose of determining such adverse claim.

The complaint alleges that the plaintiff is the owner if the land described therein and entitled to the immediate possession thereof. The answer denies plaintiff's title and alleges that the legal title is in defendant. No equities are pleaded to control the legal title.

ASSIGNMENT OF ERROR.

I.

The conclusion of law is contrary to the findings of fact.

II.

No entry was made by George F. Brott of the land in question. His application to enter was rejected by the local land office and was never recognized, allowed, or made a matter of entry and record in the local office. No right attached to the land in favor of said George F. Brott by virtue of his application to enter or proceedings in the local land office. He did not upon the decision of the secretary of the interior take any further proceedings to make or perfect an entry. The land was not segregated from the public domain by reason of any action or proceeding on the part of said George F. Brott.

III.

George F. Brott was not entitled to enter or acquire any right to the land as a mail contractor. His contract was not to carry the mails across or through territories west of the Mississippi river, and no route across or through such territories was established when his contract was executed.

IV.

The land was within the six mile limit and at St. Cloud, a terminus of the railroad. The right

of the Minnesota and Pacific Railroad Company or its successors attached when the route and terminus was defined by law and before the filing of map of definite location.

V.

Brott, not being a mail contractor under the act of congress of March 3rd, 1855, could make no claim either by settlement or filing, that would exempt the land from the grant to the state for railroad purposes.

VI.

The court erred in not holding that the legal title to the land in suit passed to the beneficiary under the granting act by virtue of the definite location of the line of road on December 30, 1857.

VII.

The court erred in not holding that the legal title to the land in controversy passed to the state of Minnesota by the certification of October 25, 1864, and in holding that said certification was open to collateral attack in an action at law.

VIII.

The court erred in holding that Brott could acquire title under the act of May 26, 1860, authorizing him to enter, for the reason that the title had passed under the granting act upon the definite location of the line in 1857.

IX.

The court erred in holding that Brott acquired any right or title by virtue of his entry and patent under the act of May 26, 1860, the United States having been divested of the title by the certification to the state of Minnesota under the railroad grant in October, 1864 prior to entry or patent.

POINT I.

The Granting act did not Pass Title to Lands "to which the Rights of Pre-emption had Attached."

No right of pre-emption had attached to the land in controversy because Brott was not a qualified claimant under the Act of 1855, and under no circumstances could he have made a lawful entry thereunder. Even if a qualified claimant, no declaratory statement was filed or entry made prior to the definite location of the railroad, or date of certification to the state.

1. Brott was not a qualified claimant under the act of 1855.

The mail contractors' act of March 3, 1855, under which Brott claimed the right to file a pre-emption declaratory statement is a part of an act making appropriations for the postal service for the fiscal year ending June 30, 1856, and is found

in the priviso to the first section of the act (10 Stats., 684.)

It is as follows:

"And that each contractor engaged or to be engaged in carrying mails through any of the territories west of the Mississippi, shall have the privilege of occupying stations at the rate of not more than one for every twenty miles of the route on which he carries a mail and shall have a pre-emption right therein, when the same shall be brought into market, to the extent of six hundred and forty acres to be taken contiguously, and to include his improvements; but no such pre-emption right shall extend to any pass in a mountain or other defile."

Brott's contract was not within the intention of the act of 1855, and he was not a qualified claimant under that act.

It will be observed that the act extends a right of pre-emption to contractors engaged or to be engaged in carrying the mail *through* any of the territories west of the Mississippi. To acquire a right of pre-emption under this act two things were necessary, viz: (1) That the person seeking to acquire the right must have been a contractor engaged in carrying the mail *through* any of the territories west of the Mississippi, and, (2) He must have selected and occupied the land for a mail station.

Brott was not a contractor engaged in carrying the mail *through* any of the territories west of the Mississippi. His mail route was a local one extending from Minneapolis to St. Cloud and was located wholly in the territory of Minnesota.

To carry the mail through the territory of Minnesota is to carry it across the territory, from one end or side of the territory to the other end or side. To carry from a point within to another point within the territory is not carrying through the territory. The language of the act is plain; it confers a right upon the persons engaged in carrying the mail *through* the territories, that is, from end to end or from side to side. Had it been the intention of congress to confer a right upon all persons engaged in carrying the mail *in* the territories, it would have used appropriate language to accomplish that end.

This was the construction placed upon the act by the officers of the land department. When Brott presented his application to file his declaratory statement, in August, 1857, it was rejected by the local land officers for the reason that his route was not such as the act of 1855 contemplated and upon appeal to the commissioner of the general land office the decision of the local officers was affirmed for the same reason.

The construction placed upon the act by the land department was uniformly followed from the time of the passage of the act until after its repeal. In the official instructions issued to the registers and receivers by Commissioner Hendricks and approved by the secretary of the interior (1 Lester's Land Laws and Decisions, 460) the commissioner says:

"It is held by this office—

"First. That to constitute a right of pre-emp-

tion under this law, the mail route on which the claim is based must form a part of a system *stretching laterally across the territory*, being *a link in or part of a connected route from the line of the state, west of the Mississippi to the Pacific*, and that no benefit or privilege is conferred by the said act on routes stretching lengthwise in a northerly or southerly direction in the territory, and forming no part of such connected route."

In the case of Robert and Stewart, who were mail contractors on a route extending from Nebraska City, Nebraska, to Marysville, Kansas, decided by the commissioner in March, 1858, (1 Lester's Land Laws and Decisions, 463,) the commissioner said:

"The question to be determined is preliminary and is, whether any right of pre-emption can attach under the act aforesaid to any portions of the public lands on said route. By circular of the 11th of September, last, approved by you, it is declared 'that to constitute a right of pre-emption under this law, the mail route, on which the claim is based, must form a part of a system stretching laterally across the territory, being a link in or part of a connected route, from the line of the states west of the Mississippi to the Pacific.' This office has decided that the route No. 15030 is not a link in or part of a connected route, from the line of the states west of theMississippi, to the Pacific."

This decision was concurred in by the Secretary of the Interior, who declined to refer the case to the Attorney General, (1 Lester, 463). And in a case decided by the Secretary of the

Interior in October, 1858, (1 Lester, 465) the Secretary of the Interior said:

"For the reasons stated by you in your letter of 11th of January last, to Hon. F. Ferguson, that said route, which runs in a northerly and southerly direction, is not a link in or part of a connected route, from the line of the states west of the Mississippi to the Pacific,' I concur in opinion with you that the Messrs. Bennett are not entitled to the right of pre-emption under said act."

That the construction of the act of 1855 announced in these decisions and instructions was the contemporaneous and uniform construction of the act is obvious from the commissioner's leter of April 9, 1858, (1 Lester, 485,) wherein in reply to inquiries of the secretary, concerning the early action of the land office, he says:

"As early as the 9th of October, 1856, the views of this office were sought by the Hon. H. M. Rice, and in reply (27th same month) he was informed 'that no pre-emption attached to any mail route stretching lengthwise in a northerly or southerly direction in the territory. That to entitle a party, the route must form a part of a system stretching laterally across the territory, being a link in, or part of a connected route from the line of the states west of the Mississippi to the Pacific.'

"Copies of this leter, at nearly the same date, were sent in reply to similar inquiries. The views thus early entertained of this mail pre-emption law, are the same as are expressed in the circular of 1857, and are the same which have governed the action of this office in all the cases submitted to its consideration up to date."

The construction placed by the land department upon the act of 1855 was recognized and

approved by congress in the act of June 21, 1860, (12 Stats., 70.) repealing the act of 1855. That act provides:

"That all entries which have heretofore been allowed by registers and receivers, and in regard to which no adverse claims have arisen under decisions of the Secretary of the Interior, or of the commissioner of the general land office, setting aside such entries, under that portion of the third proviso to the first section of an act approved third March, eighteen hundred and fifty five, * * * be, and the same are hereby confirmed, subject to any bona fide claim, under any law of the United States to the whole or any portion of the lands embraced in said entries or locations made prior or subsequent to the date of the selection thereof by the persons aforesaid."

It will be observed that this act confirms the claims of only such persons as had theretofore been allowed to make entries by the registers and receivers, and that the confirmation does not extend to entries where adverse claims have attached to the whole or any portion of the land, whether such adverse claims were initiated prior or subsequent to the selection of the land by the mail contractor pre-emption claimant.

Bearing this in mind, it is manifest that the act of 1860 expressly recognizes and approves the construction placed upon the act of 1855 by the land department. Had congress been of the opinion that the departmental construction was erroneous it would have confirmed all bona fide claims under the act of 1855 whether the claimants had been allowed to make en-

tries or not, and it would not have withheld confirmation in favor of claims initiated subsequent to the selection of the land as a mail station. If the construction of the land department was erroneous, and any contractor engaged in carrying the mail *in* any territory west of the Mississippi was within the intention of the act of 1855, then all bona fide claimants under the act, who had selected and occupied lands for mail stations, had acquired rights which entitled them to the protection of congress, and their claims would have been recognized. Congress, however, instead of confirming all bona fide claims restricted its confirmation to a certain class and to a limited extent. The act of 1860 must, therefore, be treated as a legislative construction of the act of 1855 and as a recognition and approval of the construction placed thereon by the land department.

The construction placed upon the act of 1855, by the officers of the land department was the construction of the officers whose duty it was to act upon it and carry its provisions into effect. The contemporaneous and long continued construction of a law by the officers whose duty it is to execute it, is of great weight.

United States v. *Moore*, 95 U. S. 763.
United States v. *Pugh*, 99 U. S. 265.
United States v. *Brown*, 113 U. S. 571.
United States v. *Johnston*, 124 U. S. 236.

In United States v. Moore, supra, the court say:

"The construction given to a statute by those charged with the duty of executing it is always en-

titled to the most respectful consideration, and ought not to be overruled without cogent reasons. * * * The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the law they are afterwar called upon to interpret."

The application of this rule is not affected by the fact that in this case the secretary of the interior, in August, 1861, reversed the contemporaneous and long continued construction of the land department, and held that Brott's claim was within the act of 1855. The secretary's decision was made more than a year after the repeal of the act of 1855; after most of the cases arising under the act had been adjudicated, and it does not appear, nor is it claimed that it was followed in any other case. The previous construction must, therefore, stand as the departmental construction of the act.

Brott was not engaged in carrying the mail *through* the territory of Minnesota. His route was local to the territory and wholly within it.

The trial court expressly found that he was not a contractor engaged in carrying mails through any of the territories west of the Mississippi River, except from St. Anthony (Minneapolis) to St. Cloud, and that the route on which he carried the mail did not form part of a system or any part of a route extending across any territory, but terminated at St. Cloud. (Findings, par. 11, Record, p. 16). He was not, therefore, a qualified claimant under the act of 1855, and could not acquire a right of pre-emption thereunder.

2. Brott was not a qualified claimant under the act of 1855. The right of pre-emption did not attach by reason of his selection and occupation of the land as a mail station.

The term "right of pre-emption" as used in the United States land laws signifies a preference right of purchase. To create a right of pre-emption under the general pre-emption laws there must be settlement, inhabitation and improvement of the land by the pre-emptor.

Hosmer v. *Wallace*, 97 U. S. 575.
Nix v. *Allen*, 112 U. S. 129.
United States v. *Union Pacific Ry. Co.*, 61 Fed 143.

The right of pre-emption conferred by the general pre-emption law of 1841 is restricted to such persons as are heads of families or over twenty-one years of age, and who are citizens of the United States or have declared their intention to become such, and to persons who have not previously exercised the right of pre-emption. The possession of these qualifications is a condition precedent to the acquisition of a right of pre-emption and the right cannot be initiated nor can it attach to the land by the settlement of an unqualified person.

In Boyce v. Danz, 29 Mich. 146, the court say:

"As already stated, complainant went upon the land in February, 1857, but he had not then declared his intention to become a citizen, nor did

he make that declaration until the fifth day of the next month. Before that day it was not competent for him to file a pre-emption claim, or to claim any benefit under the act. His claim was in fact filed on the fifth day of March, the same day he declared his intention to become a citizen, and the proofs are clear that within twelve months from that time he made his proofs and paid for the land. * * * *

"The settlement contemplated, as it seems to us, must be the settlement of a qualified person, and that of the complainant must consequently be deemed to have begun on the fifth day of March, 1857."

Nix v. Allen, 112 U. S. 129, involved the construction of the act of February 9, 1853, granting lands to Arkansas for railroad purposes. The grant was similar in its terms to that of 1857 to Minnesota. Mrs. Nix settled upon a quarter section within the place limits of the grant and filed her pre-emption declaratory statement in March, 1853. In 1854, prior to the definite location of the road, she made poof, payment and entry for a quarter of the quarter section. Her house was upon the quarter quarter covered by her entry, but she and her son continued to occupy and cultivate the remaining three-quarters of the quarter section until her death in 1863, which was subsequent to the definite location of the road. It was claimed that her continued occupation of the remaining three-quarters of the quarter section gave her a right of pre-emption thereto and excepted them from the railroad grant. The court say:

"All the rights of pre-emption which appellant sets up originated with his mother. In his appli-

cation to enter the lands, made in 1878, he expressly bases his claim on her original settlement and his inheritance from her. He does not claim that made a settlement himself before the rights of the railroad company accrued. *In fact he could not have made such a settlement, because he remained a minor until 1857, and the lands were withdrawn from market in 1853 on account of the railroad grant. Only persons over the age of twenty-one years could become pre-emption settlers. Such is the express provision of the act.* If, then, his mother had she been alive, could not have made a pre-emption entry in 1857, he could not."

The court then held that by entering the quarter quarter section in 1857 Mrs. Nix exhausted the one right of pre-emption which the law gave her and could not claim another, and referring to the act of congress of March 27, 1854, for the relief of settlers on lands reserved for railroad purposes, (10 Stats., 269,) say:

"The evident purpose of the act of March 27, 1854, was to aid pre-emptors. It gave the designated settlers the right of pre-emption, that is to say, a preferred right to buy the lands on which they had settled under the pre-emption laws at the ordinary minimum price. If a settler had once had the benefit of those laws, this statute gave him no new right. He could not be a pre-emptor, because he could not take the necessary oath. Consequently, when Mrs. Nix, on the 31st of March, four days after the act of March 27 was approved, made her pre-emption entry of the forty acres, she exhausted all her rights under the act of 1854, as well as those under the act of 1841. It follows that the appellant has no right under the various acts of congress which are relied on."

The principle that a right of pre-emption cannot

be initiated by the settlement of persons not having the qualifications prescribed by the pre-emption laws is the settled rule of the land department.

In Ross v. Poole (4 Land Decisions, 116) Secretary Lamar said:

"It has been repeatedly held by this department, notably in the case of McMurdie v. Central Pacific R. R. Co., (3 C. L. O., 36), that a pre-emption claimant must possess the pre-requisite personal qualifications at date of his settlement upon the land claimed; and that the doctrine of relation can only be invoked to preserve a right, but not to create one. A pre-emptor has always been required to show his qualifications. A patent for land relates back to the inception of the claim therefor; hence it must be a valid claim at its inception, because the doctrine of relation, whether applied to prevent a forfeiture or in patents to preserve the patentee's title, is only invoked to preserve a right, and not to create one."

And in Southern Pacific R. R. Co. v. Saunders (6 Land Decisions, 98,) Acting Secretary Muldrow said:

"It has been the uniform rule of the department than an alien can acquire no rights to government land prior to the time he filed his declaration of intention to become a citizen."

Again in Titmore v. Southern Pac. R. R. Co., (10 Land Decisions, 463), Secretary Noble said:

"Waiving all questions of the validity of the withdrawal of this land for the benefit of the road, it appears that at the date the company selected the tract, Titmore was not a qualified pre-emptor and his settlement upon the land while he was an alien would not prevent its selection by the company, even it no withdrawal had been made for

its benefit. His subsequent qualifications would not relate back so as to defeat an intervening right. An alien can not acquire right to public land before filing his declaration of intention to become a citizen."

Brott was not a qualified claimant under the act of 1855. His disqualification appeared on the face of his application, which set forth that he was a contractor engaged in carrying the mail "from Minneapolis, via Monticello, to Saint Cloud." He could acquire no right whatever under said act and, hence, his right of pre-emption had not attached to the land at the time the line of the railway was definitely fixed.

3. If Brott was a qualified claimant under the Act of 1855 a right of pre-emption did not attach by reason of his occupancy of the land in controversy, or by reason of the pendency of his rejected claim to enter.

In Whitney v. Taylor, 158 U. S. 85, the court say:

"It is true that there must be a settlement and improvement in order to justify the filing of such a declaratory statement. Settlement is the initial fact. The act of September 4th, 1841, Chap. 16, Fifth Stats. 453, which was in force at the time of these transactions, gave the right of pre-emption to one making "settlement in person" and who inhabits and improves the land and erects a dwelling thereon, and authorized the filing of the declaratory statement within three months after the date of such settlement. In this respect a pre-emption differs from a homestead, for the entry in

the land office is, in respect to the latter, the initial fact, Maddox v. Burnum, 156 U. S. 544. But it is also true that settlement alone, without a declaratory statement, creates no pre-emption right. 'Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a pre-emptor, the rule being that his settlement alone is not sufficient for that purpose. Lansdale v. Daniels, 100 U. S. 113-16, and the acceptance of such declaratory statement and noting the same on the books of the local land office is the official recognition of the pre-emption right."

POINT II.

The court below held that whether Brott's claim "attached to the land so as to except it from the operation of the grant it did not depend upon his claim being allowed before the location of the road became fixed." That the law entitled him, when his claim was dis-allowed, to reverse by appeal the decision of the commissioner of the general land office and of the secretary of the interior, and the final decision of this department of the government would be a decision upon the original application filed in August, 1857—it would have the same effect as though it had been made at once upon the filing of the application, and that the right of pre-emption if it attached at all attached as early, at least, as the filing of the application.

1. A right of pre-emption does not attach until the acceptance of the declaratory statement. Noting the same on the books of the local land office is the official recognition of the pre-emption claim. The pendency of an appeal from the decision of the local land office refusing to accept the declaratory statement does not alter the case.

In Kansas City v. Dunmeyer, 113 U. S. 629, the court say:

"In the case before us a claim was made and filed in the land office and there recognized before the line of the company's road was located. That claim was an existing one of public record in favor of Miller when the map of plaintiff in error was filed. In the language of the act of congress this homestead claim had attached to the land and it, therefore, did not pass by the grant. Of all the words in the English language this word "attach" is probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land but it meant a proceeding in the proper land office by which the inchoate right to the land was initiated."

In Hastings & Dakota Ry. Co. v. Whitney, 132 U. S. 357, the court say:

"Under the homestead law three things are needed to be done in order to constitute an entry on public lands. (1) the applicant must make an affidavit setting forth the facts which entitled him to make such entry. (2) He must make proper application, and (3) He must make payment of the money required. When these three requisites are complied with and the certificate of entry is executed and delivered to him his entry is made—the land is entered. If either one of these integral parts of the entry is defective—that is, if the affidavit be insufficient in its showing, or if the appli-

cation itself is informal, or if the payment is not made in actual cash, the register and receiver are justified in rejecting the application, but, if, notwithstanding these defects, the application is allowed by the land officers, and the certificate of entry is delivered to the applicant and the entry is made of record, such entry may be afterwards cancelled on account of these defects by the commissioner, or on appeal by the secretary of the interior, or, as is often the case, the entry may be suspended, etc. But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and, therefore, precludes it from subsequent grant."

In Barden v. N. P. R. R. Co., 145 U. S. 355, one Robinson made a settlement under the pre-emption laws in 1855. He subsequently filed his declaratory statement, but died without making proof and payment. His heirs made payment of purchase price and proof of his settlement to the satisfaction of the register and receiver who accepted the purchase money ,allowed the entry and issued the certificate of entry. The entry was afterwards cancelled but not until after the grant to the railroad company. The facts brought the case within the rule laid down in the Whitney case, supra, and the court held that as the proof and payment were accepted and the entry allowed by the proper land officers the entry severed the land from the mass of the public lands—excepted them from the grant.

In Sioux City Land Co. v. Griffey, 143 U. S. 32,

Griffey settled upon the land, filed his pre-emption declaratory statement, made his proof of settlement, and received his certificate of location or entry. The court held that the right of pre-emptio had attached; that the land was expected from the grant.

In Newhall v. Sanger, 92 U. S. 761; and Doolan v. Carr, 125 U. S. 618, the lands were within the claimed limits of Mexican grants which were *sub-judice* at the time of the grant to the railway company and the definite location of its road. The court held that the effect of the act of March 3, 1851, providing for the settlement of private claims in the state of California, was to reserve the lands included within the limits of any claim, Spanish or Mexican grant until the final adjudication of the claim, and that, therefore, the lands were not public lands.

In Witherspoon v. Duncan, 4 Wall. 210, this court decided in accordance with the decision in Carroll v. Safford, 3 Howard 441, that lands originally public ceased to be public after they have been entered at the land office and the certificate of entry has been obtained. And the court further held that this applies as well to Homestead and pre-emption as to cash entries. In either case, the entry being made and the certificate being executed and delivered, the particular lands entered thereby become segregated from the mass

of public lands and takes the character of private property.

In Whitney v. Taylor, 158 U. S. 85, the court say:

"This declaratory statement bears substantially the same relation to the purchase under the pre-emption law that the original entry in the homestead case does to the final acquisition of title. The purpose of each is to place of record an assertion of the intent to obtain title under the respective statutes. This statement was filed with the register and receiver and was obviously intended to enable them to reserve the tract from sale for the time allowed the settler to perfect his entry and pay for the land. By neither the declaratory statement in the pre-emption case, nor the original entry in the homestead case, is any vested right acquired as against the government, for in each fees must be paid by the applicant, and each, practically, amounts to nothing more than a declaration of an intention. It is true one must be verified and the other need not be, but this does not create any essential difference in the character of the proceeding, and when the declaratory statement is accepted by the local land officers and the fact noted on the land books, the effect is precisely the same as that which follows from the acceptance of the verified application in a homestead case, and it is entered on the land books."

2. In Brott's appeal the secretary of the interior decided that said Brott was qualified and that he should be allowed to enter the land upon making proof of his performance of the mail contract and of the occupation of the land as a station.

In the decision of the secretary of the interior reversing the commissioner's decision the only question considered was whether Brott's mail

route was such a one as the act of 1855 contemplated, and while the secretary held that it was and that Brott was qualified to enter the lands applied for, *the authority to enter was given upon the express condition that he should produce proof of his performance of his mail contract and of the occupation of the station, and upon compliance with the laws and regulations in other respects applicable to the case.*

Pending the decision on Brott's appeal by the secretary of the interior, which was made in August, 1861, the act of May 26, 1860, for his relief was passed. After the secretary's decision he took no further action under his application to enter as a mail contractor. He did not make proof of his occupation of the lands as a mail station nor did he in any manner comply with the requirements of the secretary, but on the contrary, let the matter rest until 1866, two years after the certification to the state under the railroad grant, when he applied to and was permitted to pay for and enter the land under said relief act of 1860.

Although required by the officers of the land department to produce proof of his occupation of the land as a mail station he utterly failed to do so, and thus failed to establish to the satisfaction of those officers the fact that his right of preemption had attached to the land.

His declaratory statement was never accepted or recognized.

POINT III.

The Certification of October 25, 1864, Passed the Title to the Land in Controversy to the State and the Beneficiary of the Grant.

1. By act of congress approved August 3, 1854, (10 Stats. 346,) it is provided:

"That in all cases where lands have been, or shall hereafter be, granted by any law of congress to any one of the several states and territories; and where said law does not convey the fee simple title of such lands, or require patents to be issued therefor, the lists of such lands which have been or may hereafter be certified by the commissioner of the general land office, under the seal of said office, either as originals or copies of the originals or records,shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of congress, and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim or interest shall be conveyed thereby."

By act of congress of March 3, 1865, increasing the grant of lands made by the act of March 3, 1857, (13 Stat. 526,) it is provided:

Sec. 6. "That the lands hereby and heretofore granted to said territory or state of Minnesota shall be disposed of by said state for the purposes aforesaid only, and in manner following, namely: When the governor of said state shall certify to the secretary of the interior that any section of ten consecutive miles of said road is completed in a good, substantial and workmanlike manner, as a first-class railroad, and the said secretary shall be

satisfied that said state has complied in good faith with this requirement, the said secretary of the interior shall issue to the said state patents for all the lands granted and selected as aforesaid, not exceeding ten sections per mile situated opposite to and within a limit of twenty miles of the line of said section of road thus completed, extending along the whole length of said completed section of ten miles of road, and no further."

By act of congress approved July 13, 1866, entitled "An act relating to lands granted to the state of Minnesota to aid in constructing railroads," (14 Stats., 97,) it is provided:

Sec. 3. "That all the lands heretofore granted to the territory and state of Minnesota to aid in the construction of railroads shall be certified to said state by the secretary of the interior, from time to time, located, and shall be disposed of by said state in the manner and upon the conditions provided in the particular act granting the same, as modified by the provisions of this act."

These provisions are *in pari materia* and were enacted to accomplish the same purpose, viz: to transfer the legal title and to constitute evidence of such title. The instrument of conveyance provided for by the acts of 1854 and 1866 is a certified list, and by the act of 1865, a patent.

The certified list and the patent have the same force and effect as conveyances and evidence of title to the lands embraced therein. The certified list is equivalent to a patent and passes the legal title as effectually as if the lands had been convey-

ed by a patent and is of equal dignity with the patent as evidence of title.

Frasher v. *O'Connor*, 115 U. S. 675.

McCreery v. *Heskill*, 119 U. S. 327.

Chandler v. *Calumet Mining Co.*, 149 U. S. 92.

Curtner v. *U. S.*, 149 U. S. 662.

Minnesota Investment Co. v. *Davis*, 40 Minn. 455.

Winona etc. Land Co. v. *Ebilcisor*, 52 Minn. 312.

In McCreery v. Heskill, supra, the court, speaking of the effect of the certification of lands to the state of California, say:

"For selections of lands in California in lieu of the school sections covered by Mexican grants, it has not been the practice of the land department to issue patents. When the selections are approved by the secretary of the interior, a list of them, with the certificate of the commissioner of the general land office, is forwarded to the state authorities. The list thus certified operates to convey the title to the state as fully as by patent."

In Chandler v. Calumet Mining Co., 149 U. S 92, the court says:

"The exclusion of the land in dispute from the swamp lands, selected and patented to the state, and its inclusion in the selection of the state as land coming within the grant of 1852, with the approval of such selection by the interior department and the certification thereof to the state, operated to pass the title thereto as completely as could have been done by formal patent."

And in Curtner v. United States, 149 U. S., 662, the court say:

"The company had, on February 1, 1870, whatever title it could obtain, and whatever rights belonged to it, and its cause of action then accrued. The land had already been certified to the state by the commissioner of the general land office and the secretary of the interior, and their action in that regard was in law the same as if patents had been issued to the state."

See also decisions of the secretary of the interior in

Garrigues v. *Atchison Railroad*, 6 L. D., 543.

Wright v. *California*, 8 L. D. 24.

Daly v. *Southern Minn. Railroad*, 8 L. D. 471.

California v. *Boddy*, 9 L. D. 636.

Smith v. *Ship Canal Co.*, 11 L. D., 475.

2. The certified list in question was issued under the act of 1854. The granting act of March 3, 1857, which is the source of plaintiff in error's title does not require patents to be issued for the lands granted thereby. It became the duty of the officers of the land department, therefore, to certify lists of the granted lands as evidence of the title of the territory thereto. The act of 1854 requires this to be done. It provides that lands shall be certified in all cases where the granting act "does not convey the fee simple title of such lands, or require patents to be issued therefor." Such certified list is not alone evidence of title, but is, it-

self, a conveyance in fee simple, because the act provides that the certified list shall be regarded "as conveying the fee simple of all the lands embraced in such list that are of the character contemplated by such act of congress and intended to be granted thereby."

The land in dispute is part of an odd section within the place limits of the grant of 1857, and as it was not reserved to the United States when the grant became operative, it is of the character contemplated by the grant and was intended to be granted thereby, unless a right of pre-emption had attached at the time the line of the road was definitely fixed. Whether such a right had attached was a question for the officers of the land department to decide. There is, in this respect, no difference between the acts of 1854, 1865 and 1866. In each case the department has jurisdiction and it is its duty to inquire and determine what lands are embraced by the grant and are intended to be granted thereby. Indeed it is impossible to administer the grant on any other theory.

While it is often, without much reflection or knowledge of the practical adjustment of such grants, said that the grant passes the title to the lands and that the patent or certification is only the evidence, as a matter of fact, that is never true. In all such cases it is the *adjustment* or decision of the secretary that determined as to many of the tracts, what lands fall within the grant. In many cases it is necessary for the secretary to act before it can be ascertained whether particular lands are,

or are not, within the contemplation of the grant and intended to be granted thereby; and whether such lands are, or are not, within the grant is conclusively determined by the action of the department. It is the duty of the department to ascertain and fix the limits of grants in aid of the construction of railroads. The line of a road as definitely fixed rarely, if ever, follows the sectional or sub-divisional lines. It follows, of course, that the lateral limits of a grant, distant six miles from the line of the road as definitely fixed, will not follow the sectional or sub-divisional lines, and that very many, if not all, of the government subdivisions which lie along the edge of the grant are situated a part within and a part without its limits.

In the adjustment of the various grants made by congress the department saw the difficulty which this would occasion and at an early date, in the adjustment of the grants made for canal purposes, it adopted the rule that where the greater portion of any legal subdivision was within the limits of the grant, that the whole of such subdivision would be treated as being within, and, on the other hand, where the greater portion of any subdivision was without the limits, that the whole of such subdivision would be treated as being without them. This rule has been followed without question for many years and was adopted by congress in making the grant of swamp lands to the several states by act of September 28, 1850, which grant provides that where the greater portion of any legal sub-

division is swamp and overflowed, within the meaning of said grant, that the whole of said subdivision shall be deemed to be swamp lands within the meaning of the grant.

When the department, in pursuance of this rule, fixes the limits of a grant and ascertains and determines that any legal subdivision is within the grant, that which was before uncertain is, by the action of the department, made certain, and the grant at once takes effect upon the whole of the legal subdivision.

It could not be claimed that a certified list embracing lands thus ascertained and determined to be within the limits of the grant is void as to such lands, and this because the law makes it the duty of the secretary to adjust the grant and determine what lands are embraced in the grant and intended to be granted.

2. The court below in this case (Record p. 25) held—that the certification of this land did not convey the legal title because the pre-emption right of Brott had attached, and, therefore, that the land was not of the character intended to be granted.

But the filing of a pre-emption declaratory statement does not segregate the land from the mass of the public lands.

"By neither the declaratory statement in a pre-emption case, nor the original entry in a home-

stead case, is any vested right acquired as against the government." (Whitney v. Taylor, 158 U. S. 95.) The filing of this paper (declaratory statement) did not withdraw the land from further or other sale; did not prevent another pre-emption claimant from filing on the same land in utter disregard of this prior filing, and no claim attached as against a subsequent pre-emptor or a homestead claimant to the same land. (United States v. Union Pacific Ry. Co., 61 Fed. 143; Quinn v. Chapman, 111 U. S. 445.)

The most that Brott did was to present an application to file a declaratory statement and upon its rejection upon the ground that he was not qualified, to carry his case to the commissioner and eventually to the secretary by appeal. His application was simply an unsworn and uncorroborated statement that he was a contractor with the United States for carrying the mail from Minneapolis via Monticello to St. Cloud, and that he did on the 7th day of January, 1856, settle upon and improve as a mail station the land applied for. In the decision of the secretary of the interior, reversing the commissioner's decision the only question considered was whether Brott's mail route was such a one as the act of 1855 contemplated. Pending the decision of his appeal, which was made in August, 1861, the act of May 26, 1860, for his relief, was passed. After the secretary's decision he took no further action under his application to enter as a mail contractor; did not make proof of his occupation of the land as a mail station; nor

did he, in any manner, comply with the requirements of the secretary, but, on the contrary, let the matter rest until 1866, two years after the certification to the state under the railroad grant, when he applied to and was permitted to pay for and enter the land under relief act of 1860. *Although required by the officers of the land department to produce proof of his occupation of the land as a mail station, he failed to do so, and thus failed to establish the fact that his right of pre-emption had attached to the land.*

The supreme court of the state of Minnesota in the case of Winona Land Co. v. Ebilcisor, 52 Minn. 312, in effect, overrules its decision in the case at bar.

In the Ebilcisor case the facts were these: On May 17, 1864, one Locke settled upon and made homestead entry of a certain odd numbered section of land. He occupied the land until June, 1867, when he left it, whereupon his entry was cancelled by the commissioner of the general land office. The line of the Winona & St. Peter Railroad was definitely fixed August 3, 1864, and the land embraced by Locke's homestead entry, then, and for three years thereafter, a subsisting entry of record, was found to be within the six mile or place limits of the railroad grant. After the cancellation of Locke's entry Ebilcisor, in July, 1871, settled upon and entered the land under the pre-emption law. His entry was cancelled by the commissioner of the general land office in 1872, and the land certified to the state under the railroad grant in

1874. The land company as grantee of the railroad company brought ejectment against Ebilcisor. It was contended on behalf of the latter that the land was excepted from the railroad grant by Locke's homestead entry and that the certification, in that it attempted to convey under the grant lands which were not granted, was without authority and, therefore, absolutely void. The court in an elaborate opinion, held that the certification was not void, but voidable only; that it passed the legal title and was not, therefore, open to collateral attack in an action at law. The court say:

"It is hardly necessary to advert to the feature of this case which distinguishes it from that just referred to, and which is the very basis of our decision in the case of Davis, and which also is fully recognized in the decisions of the supreme court of the United States. * * * It was within the jurisdiction of the land department of the government—a part of its duty—to adjust the land grant made to the state to aid in the construction of the railroad, within the limits of which grant this land is found to lie, as well as to administer the laws relating to pre-emption and homestead claims. It was required to determine whether lands upon which homestead or pre-emption filings were sought to be made were subject to be so appropriated; to decide conflicting claims of the railroad company and the homestead or pre-emption settler; to certify to the state, under the law of 1866, the lands found to be within the operation of the railroad grant, and to patent to the homestead settler or pre-emptioner the land to which he should become entitled under the laws. And while, in the discharge of these duties, the officers of the government might err, either in the determination of matters of fact or in respect to the law.

as any tribunal may, such error would not render their action and final determination void and of no legal effect."

The court seek to distinguish the Ebilcisor case from the case at bar by referring to the language in the act of 1854, that where lands embraced in the certified lists thereby authorized are not of the character embraced by the granting act, and are not intended to be granted thereby, said lists, so far as such lands are concerned, shall be perfectly null and void, and claiming that the act of July 3, 1866, contains no such restriction upon the effect of the certified lists as evidence of title. There is, however, no basis for this distinction. In each case only *lands granted* are authorized to be certified.

It will be observed that the act of 1866 authorizes the secretary to certify the *lands theretofore granted*. If any land was not, in fact, granted, then said act does not authorize the secretary to certify it, and applying the reasoning of the court in the case at bar, his certification, being without authority, would be null and void. The act, therefore, in effect, contains the same restrictions as are found in the act of 1854. The court held, however, in the Ebilcisor case, that as it was the duty of the secretary, in the adjustment of the railroad grant, to determine what lands were granted, his determination and the certification, under the act of 1866, operated to pass the legal title, and to divest him of any further jurisdiction over the land. The same is unquestionably true of the certifica-

tion under the act of 1854. If it was the duty of the secretary, as it was his duty in the case at bar, to inquire and determine what lands were granted, the certification of the land in question, which is evidence of his determination that it was within the contemplation of the grant and intended to be granted thereby, passed the legal title and exhausted his jurisdiction over it.

Each of these laws of 1854, 1865 and 1866 is applicable to the lands granted by the act of March 3, 1857. Had a patent issued to the state of Minnesota for the land in controversy, after the passage of the act of 1865, the supreme court of Minnesota, following its reasoning in the Ebilcisor case, would, undoubtedly, have held that such patent passed the title even though Brott's right of pre-emption had, in fact, attached, and this for the reason that the land department had jurisdiction to determine whether a pre-emption right had attached; the patent being itself, such a determination that a right had not attached as cannot be collaterally attacked.

The rule is elementary and does not admit of an exception, that when any court or tribunal has jurisdiction to decide a question, its decision of that question is conclusive as against collateral attack and this rule prevails whether the tribunal is one of general or limited jurisdiction. Nor does it admit of question but that the secretary of the interior, *and he only* had jurisdiction to determine in the first instance whether this railroad company, or Brott, under whom defendant

claims, was entitled to these lands. Nor is it an open question but that in deciding this question he acted in a quasi judicial character, unless this is an exception to the general rule in such cases. And even if the secretary of the interior, in deciding such questions, honestly draws wrong conclusions as a matter of fact from the testimony, there is no review, unless the error is the result of fraud or imposition. As said by this court in Lee v. Johnson, 116 U. S. 49:

"The court does not interfere with the title of a patentee when the alleged mistake relates to a matter of fact concerning which those officers may have drawn a wrong conclusion from the testimony. A judicial inquiry as to the correctness of such conclusions would encroach upon the jurisdiction which congress has devolved exclusively upon the department. It is only when fraud and imposition have prevented the unsuccessful party in a contest from fully presenting his case, etc., that a court will look into the evidence."

But, as the court says in the same case: "If, however, these officers mistake *the law* applicable to the facts, or misconstrue the statutes, and issue a patent to one not entitled to it, the party wronged *can resort to a court of equity* to correct the mistake, and compel *the transfer of the legal title* to him as the true owner," i. e., adjudge the party to whom the title was erroneously conveyed to hold in trust for the person legally entitled thereto.

And in Smelting Company, v. Kemp, 104 U. S. 636:

"So, also, according to the doctrine in the case

cited, if a patent is issued without authority, (i. e., when the secretary has no jurisdiction to pass on the question) it may be collaterally impeached in a court of law. This exception is subject to the qualification that when the authority depends upon the existence of particular facts, or upon the performance of some antecedent acts, and it is the duty of the land department to ascertain whether the facts exist, or the acts had been performed, its determination is as conclusive of the existence of the authority as against collateral attack, as is the determination upon any other matter properly submitted to its decision."

All this is familiar law, and is conclusive of this case,unless as above stated,this case is exceptional, and unless the rules applicable in adjustment and administration of land grants generally are inapplicable to this case.

We do not think that the difference in the wording of such grants in this respect can properly be held to have any significance. In some grants it is expressly provided that the secretary shall indicate and patent or certify the lands granted, while in others no such power is in words conferred. This is true not only as to grants in aid of different lines and in different years, but also as to grants made in aid of the same line at different times, and even as to grants amending or expanding prior grants.

No reason can possibly be suggested for holding that the congress intended to give to the secretary the power to *decide* in one such case what lands fall within the grant, and to withhold from him that power in the other. On the contrary,

the rule that grants *in pari materia* are to be construed together, each throwing light on and assisting in the proper construction of the other, is to be applied in such cases. Any other rule would lead to most manifest absurdity.

This case is a good illustration. As we have shown it is held that under acts like that of March 3rd, 1865, the secretary had the power and it was his duty to decide what lands, either in place or indemnity limits, were granted, and his decision of those matters is conclusive against collateral attack.

That act merely expanded the grant by the act of 1857, and widened out the place and indemnity limits, but the rights of the company under the earlier grant were otherwise unaffected.

Under these circumstances it clearly would be not only against reason, but absurd and wholly impracticable ,to administer that grant, applying one theory to it so far as the lands were granted by the earlier act, and another so far as they were granted by the later; and the difficulties encountered here will be found to stand in the way of adjustment and administration of any of these grants on any other theory than that the secretary in the first instance *has the power and duty to decide* what lands fall within the grants.

Of course, we are not to be understood to contend that the acts or decisions of the secretary would have any force or effect where he has not jurisdiction of the subject matter.

POINT IV.

This is an Action at Law in which the Sole Issue is the Legal Title. The Certification of the Lands by the Secretary of the Interior, even through a Pre-emption Right had Attached, is not void. It is Conclusive Evidence of the Legal Title in this Action.

1. In its opinion (Record p. 22) the supreme court of Minnesota say:

"The sole issue in this action relates to the legal title. The defendant only opposes to the plaintiff's asserted title a denial and a claim of title in himself. No facts are pleaded which might entitle the defendant to equitable relief, and the decision of the court below is solely upon the issue as to the legal title."

2. It may be conceded that when a patent (or certified list) is executed by an officer who has no authority to execute it, or its issue is prohibited by statute, or the state had no title, or the land had been reserved for other purposes, the patent, or certified list, is absolutely void and may be impeached collaterally in an action at law. But if the officer executing it had jurisdiction to act in respect to the lands conveyed, and such lands were public lands and their sale or other disposal had been provided for by law, the patent (or certified list) while it may be voidable is not absolutely void. Until set aside by a direct proceeding it must stand against collateral attack with all the efficacy attending a valid conveyance.

In United States v. Winona & St. Peter R. R. Co., the circuit court of appeals, eighth circuit, (Fed. Rep. Vol. 67, July 9, 1895,) say:

"For the purpose of the determination of these cases we concede to the United States but we do not decide that the existence of a pre-emption filing upon a tract of land at the time of the definite location of the line of a land-grant railroad excepted the tract from the grant to the railroad company to the same extent as the existence of a homestead entry upon it would have done. Under this concession it must be admitted that the decision of the officers of the land department, evidenced by their certificates, that the grants to the Winona Railroad Company attached to the lands in controversy, was erroneous. They should have held that these lands were excepted from these grants by the existence of the homestead entries and pre-emption filings upon them when the line of the railroad was definitely located, and that these lands did not fall within the grant to that company. Citing Dunmeyer case, and others. * * * * The question is, were the certificates of the officers of the land department absolutely void, so that they conveyed no title, legal or equitable, and so that they were constantly open to collateral attach. All the lands certified for the Winona Company were within the place limits of its grants. The certificates were evidence that the officers of the land department had adjudged that the grant to the Winona Railroad Company had attached to the land in controversy, and their legal effect was the same as though patents to the state had been issued for the benefit of that company. Frasher v. O'Connor, 115 U. S. 102, 116; 5 Sup. Ct., 1141; Curtner v. U. S., 149 U. S., 662, 675. A patent issued by the officers of the land department of the United States in a case within the scope of their power of jurisdiction is dual in its effect: It is an adjudication of those officers that the patentee is entitled to the land under the laws of the United States, and it is a conveyance of the

title to that land to the patentee. * * *
The land department of the United States, then, including in that term the secretary of the interior the commissioner of the general land office and their subordinate officers, constitutes a special tribunal, vested with the judicial power to hear and determine the claims of all parties to the public lands it is authorized to dispose of, and to execute its judgments by conveyances to the parties entitled to them. When a claim under a grant for a railroad company is made to a portion of the public lands under its control, that tribunal must determine whether or not the claimant is the beneficiary of the grant, whether or not it has so far complied with its conditions that it is entitled to its benefits, whether or not the public land claimed is a portion of the grant, and whether or not any other party has a superior right to it. When a claim is made under the homestead or pre-emption laws for a portion of the public domain, that tribunal must determine whether or not the claimant is qualified to acquire lands, etc. In every case there must, in the nature of things, be a decision of questions of fact and of questions of law, because in every case the ultimate question is whether or not the facts proved show that the claimant is entitled to the land, under the acts of congress. A certificate or patent is the record evidence of the judgment of this tribunal, and it necessarily follows that when such a judgment is rendered in a case within the jurisdiction of the land department, it is, like the judgments of other special tribunals, vested with judicial powers impervious to collateral attack. These propositions are not questioned by counsel for the government, but his contention is that the land department was without jurisdiction to decide whether these lands fell within the grants to the railroad company, and rightfully belonged to it, or were excepted from these grants; and he maintains that, since this department was without jurisdiction to decide this question, the certificates were without authority and void. In support of these

views he has cited many authorities, but a careful examination of these decisions has convinced us that they do not rule this case. They are cases in which the power to hear and determine claims of the parties to the land in controversy, and to convey it to the rightful claimant, was not vested in the land department when it rendered its decision and made its conveyance. They are cases in which the title to the land patented or certified had passed out of the government, and, hence, was not within the jurisdiction of the officers of the land department, when that tribunal decided and attempted to convey it, as in Polk v. Wendal, 9 Cranch. 87; Stoddard v. Chambers, 2 How. 284, 318; Easton v. Salisbury, 21 How. 426, 432; Reichart v. Phelps, 6 Wall. 160; Best v. Polk, 18 Wall. 112, 117, 118; Sherman v. Buick, 93 U. S. 209; Iron Co. v. Cunningham, 15 Sup. Ct. 183, or cases in which the land was reserved from sale or disposition by the land department until a claim under a Mexican or Spanish claim should be determined and the power to determine the extent and validity of this claim had been conferred upon tribunals other than the land department, and the final decisions of those tribunals had not been made when the claim of the patentee was initiated, as in Doolan v. Carr, 125 U. S. 618, 624, 632; 9 Sup. Ct. 1228, or cases in which the land had been set apart as a portion of a military or other like reservation, and had thus ceased to be a part of the public domain, subject to sale or other disposition by the officers of the land department, as in U. S. v. Stone, 2 Wall. 525, 527, and Wilcox v. Jackson, 13 Pet. 499, 511. In all these cases the land that was the subject matter of the patents or certificates, and the rights of the claimants to it, were not subject to the jurisdiction of the land department. On the other hand, in every case to which our attention has been called in which the power to hear and determine the claims of applicants for lands of the United States, and upon such determination to dispose of those lands, either under the pre-emption or homestead laws,

under grants for railroad or other corporations, or by sale, or in any other recognized mode, has been vested in the land department, the supreme court has uniformly held that the patent or certificate issued from the department conveyed the legal title and was not open to collateral attack. Minter v. Crommelin, 18 How. 87, 89; U. S. v. Schurz, 102 U. S. 378, 401; French v. Fyan, 93 U. S. 169, 172; Quinby v. Conlan, 104 U. S. 420; Smelting Co. v. Kemp, 104 U. S. 636, 645, 647; Steel v. Refining Co. 106 U. S. 447, 450; 1 Sup. Ct. 389; Heath v. Wallace, 138 U. S. 573, 585; 11 Sup. Ct. 380; Knight v. Association, 142 U. S. 161, 212; 12 Sup. Ct. 258; Noble v. R. R. Co., 147 U. S. 174; 13 Sup. Ct. 271; Barden v. R. R. Co., 154 U S. 288; 14 Sup. Ct. 1030. * * * A careful study and analysis of these decisions will show that none of them are inconsistent with the following rules, (1) a patent or certificate of the land department to land, over which that department has no power of disposition and no jurisdiction to determine the claims or applicants for, under the acts of congress, is absolutely void, and conveys no title whatever. Land the title to which had passed from the government to another party before the claim on which the patent is based was initiated, land reserved from sale for military and other like purposes, land reserved by a claim under a Mexican or Spanish grant sub judice, and lands for the disposition of which the acts of congress have made no provision, is of this character. (2) A patent or certificate of the land department to lands over which that department has the power of disposition and the jurisdiction to determine the claims of applicants for, under the acts of congress, is impregnable to collateral attack, whether the decision of the department is right or wrong, and it conveys the legal title to the patentee or to the party named as entitled to that title in the patents or certificate. A court of equity may, in a direct proceeding for that purpose, set aside such a patent or certificate, or declare the legal title under it to be held in trust for

one who has a better right to it, in cases in which the action of the land department has resulted from fraud, mistake, or erroneous views of the law.

In Smelting Co. v. Kemp, 104 U. S. 636, the court say:

"According to the doctrine thus expressed and the cases cited in its support,—and there are none in conflict with it,—there can be no doubt that the court below erred in admitting the record of the proceedings upon which the patent was issued, in order to impeach its validity. The judgment of the department upon their sufficiency was not, as already stated, open to contestation. *If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved.* He must resort to a court of equity for relief and even there his complaint cannot be heard unless he connects himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentees hands."

And in Lee v. Johnson, 116 U. S. 49, the court say:

"The patent having been issued by the officers of the land department, to whose supervision and control are entrusted the lands, all reasonable presupmtions are indulged in support of their action. It cannot be attacked collaterally, but only by a direct proceeding instituted by the government or by parties acting in its name, and by its authority. *If, however, those officers mistake the law applicable to the facts, or misconstrue the statutes and issue a patent to one not entitled to it, the party wronged can resort to a court of equity*

to correct the mistake and compel the transfer of the legal title to him as the true owner. The court in such a case merely directs that to be done which those officers would have done if no error of law had been committed."

In Crapo v. Township of Troy, 98 Mich. 635, the land was within the limits of a railroad grant; was selected by the railroad company and the selection was approved and the land certified by the land department on June 18th, 1859. The land was subsequently selected by the state under the swamp land grant of 1850; the selection was approved and patent issued to the state under said swamp land grant July 25, 1862. The question turned upon the effect of the certification to the railroad company as a conveyance and evidence of title, for if the certification was void the title remained in the United States and passed to the state by the patent of 1862. The court say:

"In the present case it not only appears that the secretary of the interior under the date of June 18, 1859, approved the selection of the lands by the Flint and Pierre Marquette Railroad Compjany, and thereby designated the lands as within the grant to the state to aid in the construction of that road, but it also appears that in the case of lands designated as swamp lands, and approved by the secretary of the interior, under section 2 of the act of 1850, the lands in question were not included. So that there was not only a determination that the lands vested in the railroad comany, but there was also a determination that they were not swamp lands. This vested the title in the railroad company, beyond the powers of the department thereafter to divest it by the mere issue of a patent. The department had no longer any juris-

diction to dispose of the land, and that fact may be shown in an action of ejectment."

The case of Doolan v. Carr, 125 U. S. 618, does not assert a contrary doctrine. In that case the lands were embraced in a Mexican grant at the date of the grant to the railroad company and of the definite location of its road. The effect of the act of congress of March 3, 1851, was to reserve all such lands from all other disposition until the validity of the Mexican grant was finally determined. They were not, therefore, *public lands* at the date of the railroad grant and hence, were not subject to the grant. In the concurring opinion in Knight v. Land Association, 142 U. S. 161, 212, Mr. Justice Field, speaking of the decision in Doolan v. Carr, says:

"Nor can a patent of the United States be issued by the officers of the land department for lands reserved from settlement and sale; and the want of authority in the officers can be shown at law to defeat a patent of that character. It is in such case an attempted conveyance of land not open to sale; as would be a patent for land within the Yellowstone or Yosemite park. It was of land within the limits of a valid Mexican claim excluded from grant to the Central Pacific Railroad Company that the decision in Doolan v. Carr had reference. It was there held that the patent to the railroad company could be defeated by showing that the lands conveyed were thus excluded. *There was nothing new in the doctrine that it could be shown in an action at law that the property patented was not subject to grant.*

* * * * * * * * *

"*The attempt is futile to use these cases, or any other case, to establish the proposition that if an error can be shown in the action of an officer of*

the land department in a matter subject to its jurisdiction the proceeding of the officer may be treated as a nullity and the patent issued thereon be collaterally assailed. This view is untenable; and does not merit serious consideration. If it could be sustained it would be subversive of all security in the judgments of ordinary tribunals, as well as in those of special tribunals like the land department."

3. It was within the jurisdiction of the secretary to adjust the grant of 1857. It was his duty to inquire and determine whether a right of pre-emption had attached to the lands in controversy and the certification of October, 1864, is of itself a determination, first, that a right of pre-emption had not attached, and, second, that the lands are embraced in the grant.

It was the duty of the secretary of the interior to adjust this railroad grant and certify the granted lands to the state. In so doing it was necessary and it was his duty to ascertain and determine what lands were granted and what were not granted. In Wisconsin Railroad Co. v. Price Co., 133 U. S. 496, the court say:

"The approval of the secretary was essential to the efficacy of the selection, and to give to the company any title to the lands selected. His action in that matter was not ministerial but judicial. *He was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands;* and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. *In order to reach a proper conclusion on*

these two questions he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established."

In ascertaining whether there were any deficiencies in the lands granted by the act of 1857, the secretary was required, and it was his duty, as the court say, to determine whether any lands in the place limits had been previously disposed of, or whether any pre-emption or homestead rights had attached. In determining what lands were not granted he must necessarily determine what were granted.

In the discharge of this duty the secretary in adjusting the grant of 1857 certified the lands in controversy to the state of Minnesota as a part of the lands granted by said act. This certification having the force and effect of a patent is of itself evidence that all the antecedent steps have been regularly taken and that the secretary had duly ascertained and determined that the lands embraced thereby had not been previously disposed of and that no pre-emption or homestead right had attached to them.

Minter v. *Crommelin*, 18 How. 87.
Ehrhardt v. *Hogaboom*, 115 U. S. 67.

And there was ample grounds to support such a determination. The decision of the department that Brott possessed the qualifications prescribed

by the act of 1855 and should be allowed to enter upon producing proof of his occupation of the land as a mail station was rendered in August, 1861. More than three years had elapsed and no proof of such occupation had been offered. The secretary was doubtless of opinion, after this lapse of time, that Brott was unable to furnish the required proof, and, as occupation of the land as a mail station was essential to the acquisition of any right under the act of 1855, that the right of pre-emption had not attached, and accordingly certified the land under the railroad grant. His action in so doing was a determinaton that Brott's right of pre-emption had not attached to the land. The lands were public lands of the United States, within the jurisdiction of the secretary, and his action in certifying them is conclusive in an action at law.

Johnson v. *Towsley*, 13 Wall. 72.
Smelting Co. v. *Kemp*, 104 U. S. 636.
Steele v. *Smelting*, 106 U. S. 447.
Lee v. *Johnson*, 116 U. S. 49.
Noble v. *Logging Co.*, 147 U. S. 165.
Chandler v. *Calumet Mining Co.*, 149 U. S. 93.
Minn. Investment Co. v. *Davis*, 40 Minn. 455.
Winona, etc., Land Co. v. *Ebilcisor*, 52 Minn. 312.
Crapo v. *Town of Troy*, 98 Mich. 635.

The decision of the supreme court of the state that the certification could pass the title to such

lands only as were conveyed by force of the granting act itself, and could have no effect upon any lands which were not actually granted, is not supported by the authorities. The swamp land grant of September 28, 1850, was *in praesenti* and passed to the several states the title to the swamp and overflowed lands within their respective limits. It has been repeatedly held, however, that, as the law makes it the duty of the secretary of the interior to ascertain and determine what lands are swamp and overflowed and issue a patent therefor, a patent so issued cannot be impeached in an action at law by showing that the lands embraced in the patent were not in fact swamp and overflowed lands, and, therefore, not granted.

French v. *Fyan*, 93 U. S. 169.
Ehrhardt v. *Hogaboom*, 115 U. S. 67.
Wright v. *Roseberry*, 121 U. S. 488.
Chandler v. *Mining Co.*, 149 U. S. 92.

Again, the act of July 2, 1864, granting lands to the Northern Pacific Railroad Company expressly excludes all mineral lands from the operation of the grant; yet, in the case of Barden v. Northern Pacific Railroad, 154 U. S. 288, 330, the court held that, as it is the duty of the officers of the land department to investigate and determine what lands are mineral and what are not mineral, their determination is conclusive in an action at law.

THE ACT OF MAY 26, 1860.

The act of May 26, 1860, (12 Stats. 843) entitled "An Act for the relief of George F. Brott," omitting the descriptions, is as follows,

"Be it enacted, etc., that George F. Brott, be, and is hereby authorized to enter the following described lands, to-wit: * * * said tracts containing five hundred and sixty-two and twenty-hundredths acres, upon the payment by the said Brott of the usual minimum of one dollar and twenty-five cents per acre therefor. Provided, that said entry shall in no wise interfere with or embrace any land to which there is a valid subsisting claim under the pre-emption laws of the United States; and the commissioner of the general land office is directed to issue a patent on said entry."

1. Brott could acquire no right or title under the act of 1860, for the reason that the title had passed to the Territory of Minnesota under the granting act of 1857, on the definite location of its railroad route, December 30, 1857.

The land in controversy is part of an odd numbered section within the six mile or place limits of the railroad grant. The grant made by the act of March 3, 1857, was in words of present grant and the act passed to the territory and future state of Minnesota a present beneficial interest in the lands therein designated.

Schulenberg v. *Harriman*, 21 Wall. 44.

Leavenworth &c R. R. Co. v. *United States*, 92 U. S. 733.

Mo. K. & T. Ry. v. *Kan. Pac. Ry.*, 97 U. S. 491.

Wisconsin Railroad Co. v. *Price County*, 133 U. S. 496.

In Wisconsin Railroad Co. v. Price Co., supra, the court say:

"The title conferred was a present one, so as to insure the construction of the road proposed against any revocation by congress, except for non-performance of the work within the period designated, accompanied, however, with such restrictions, upon the use and disposal of the lands as to prevent their diversion from the purposes of the grant."

It may be conceded that, if Brott's claim under the law of 1855 was of such a character as to except the lands embraced by it from the railroad grant, the subsequent disposal of the land was of no moment to the railroad company, (grantee of the territory), and it would be competent for congress, in such case, to provide for its disposal as it should deem proper. But on the other hand, if Brott's claim was not of such character the passage of the act of 1860, after the location of the railroad; after the identification of the land as part of the lands granted by the act of 1857, and after the title had vested in the territory, subject only to the possibility of forfeiture for breach of the conditions subsequent annexed to the grant, was beyond the power of congress and the act is null and void.

Sinking Fund Cases, 99 U. S. 700.

Rice v. *Railroad Co.*, 1 Black, 360.

In Rice v. Ry Co., supra, the facts were as follows:

By an act approved June 24, 1854, congress made a grant of lands to the territory of Minnesota to aid in the construction of a certain railroad and by act approved August 4, 1854, it repealed the said granting act. The questions presented for the decision of the court were, first: whether the railroad company, grantee of the territory, acquired any right or title to the lands in controversy by virtue of the provisions of its charter as originally granted by the territorial legislature, and, second: whether the territory by the true construction of the act of congress of June, 1854, acquired any beneficial interest in the lands granted as contradistinguished from the mere naked trust or power to dispose of the land for the use and purpose described in the act. Passing upon these questions the court say:

"Argument is not necessary to show that those questions arise in the case, because if the defendants acquired such a right, title or interest in the lands, under their original charter, *then it is clear that it became a vested interest as soon as the act of congress went into effect; and on that state of the case it would be true, as contended by the defendants, that the repealing act set up in the replication of the plaintiff is void, and of no effect.* (*Terret* v. *Taylor*, 9 Cran. 43; *Pawlet* v. *Clarke*, 9 Cran. 292.)

"But the determination of that question in the negative does not necessarily show that the plaintiff is entitled to prevail in the suit, *because, if the legal effect of the act of congress set up in the answer was to grant to the territory a beneficial interest in the lands, then it is equally clear that*

it was not competent for congress to pass the repealing act, and divest the title."

2. Brott acquired no title by his entry and patent under the act of 1860 for the reason that the secretary of the interior was without authority to allow the entry or issue the patent, the United States having been divested of its title by the previous certification of October 25th, 1864, under the railroad grant.

The right conferred upon Brott by the act of May 26, 1860, was no more than a privilege of entering the land described therein upon payment of the designated purchase price—a privilege of which he might or might not avail himself. Until he exercised his privilege and paid the purchase price he had no vested right in the land, and could have no legal title until patent issued.

His patent was issued in July, 1871. He paid the purchase money and made the entry on which his patent was founded in November, 1866. The land covered by his entry and patent was certified by the secretary of the interior under the railroad grant October 25th, 1864. By this certification, as we have shown, the United States was divested of the legal title; the jurisdiction of the officers of the land department was exhausted and it was not thereafter competent for them to entertain Brott's claim under the act of 1860, or issue to him a patent under said act.

In Moore v. Robbins, 96 U. S. 530, the court,

speaking of the jurisdiction of the land department, say:

"If an individual setting up claim to the land has been injured, he may, under circumstances presently to be considered, have his remedy against the party who has wrongfully obtained the title which should have gone to him.

"But in all this there is no place for the further control of the executive department over the title. The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in every instance where, under the decisions of the officers having authority in the matter a conveyance, generally called a patent, has been signed by the president and sealed and delivered to and accepted by the grantee. It is a matter of course that, after this is done, neither the secretary nor any other executive officer can entertain an appeal. He is absolutely without authority. If this were not so, the title derived from the United States, instead of being the safe and assured evidence of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the land office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the government to annul his title."

If Brott was injured by the action of the secretary in certifying this land to the state, he should seek his remedy in a court of equity and not by an action at law in which the legal title must prevail.

It is submitted that the judgment of the supreme court of Minnesota should be reversed.

M. D. GROVER,

Attorney for Plaintiff in Error.